(11)

No. 97-1754-CFX Title: Immigration and Naturalization Service, Petitioner
v.
Juan Anibal Aguirre-Aguirre

Docketed: April 28, 1998 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Feb 13 1998	Application (A97-610) to extend the time to file a petition for a writ of certiorari from February 24, 1998 to March 26, 1998, submitted to Justice O'Connor.
	Feb 17 1998	Application (A97-610) granted by Justice O'Connor extending the time to file until March 26, 1998.
	Mar 16 1998	Application (A97-610) to extend further the time to file a petition for a writ of certiorari from March 26, 1998 to April 25, 1998, submitted to Justice O'Connor.
	Mar 17 1998	Application (A97-610) granted by Justice O'Connor extending the time to file until April 25, 1998.
	Apr 27 1998	Petition for writ of certiorari filed. (Response due July 6, 1998)
	May 11 1998	Order extending time to file response to petition until June 29, 1998.
	Jun 12 1998	Order further extending time to file response to petition until July 6, 1998.
	Jul 6 1998	Brief of respondent Juan Anibal Aguirre-Aguirre in opposition filed.
	Jul 22 1998	DISTRIBUTED. September 28, 1998
	Jul 23 1998	Reply brief of petitioner Immigration and Naturalization Service filed.
	Jul 23 1998	LODGING consisting of a copy of certified administrative record filed in the court of appeals and a tape recording of administrative hearing on cassettes 1 through 3 submitted by the Solicitor General
	Sep 24 1998	LODGING consisting of ten copies of an affidavit of the Certified Court Interpreter submitted by counsel for the respondent.
	Oct 5 1998	Petition GRANTED. SET FOR ARGUMENT March 3, 1999. **********
	Nov 9 1998	Order extending time to file brief of petitioner on the merits until December 4, 1998.
	Nov 9 1998	Order extending time to file brief of respondent on the merits until January 19, 1999.
	Dec 4 1998	Joint appendix filed.
	Dec 4 1998	Brief of petitioner Immigration and Naturalization Service filed.
	Jan 5 1999	Order further extending time to file brief of respondent on the merits until January 21, 1999.
	Jan 21 1999	Brief amicus curiae of Lawyers Committee For Human Rights filed.
	Jan 21 1999	Brief of respondent Juan Anibal Aguirre-Aguirre filed.
	Jan 21 1999	Brief amici curiae of Massachusetts Law Reform Institute, et al. filed.
	Jan 21 1999	LODGING consisting of twelve copies of the Spanish

2 pp

No. 97-1754-CFX

Entry	Date	Proceedings and Orders
		originals of Appendix B of amici curiae brief of Massachustees Law Reform Institute, et al. submitted by counsel for the amici
	Jan 21 1999	Brief amicus curiae of United Nations High Commissioner for Refugees filed.
	Jan 22 1999	CIRCULATED.
	Feb 17 1999	Reply brief of petitioner Immigration and Naturalization Service filed.
	Feb 24 1999	Record filed.
	Mar 3 1999	ARGUED.

Supreme Court, U.S.
FILED

97 1754 APR 27 1998

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1997

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

JUAN ANIBAL AGUIRRE-AGUIRRE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals erred in reversing the decision of the Board of Immigration Appeals' determination that respondent is barred from eligibility for the relief of withholding of deportation under Section 243(h)(1) of the Immigration and Nationality Act, 8 U.S.C. 1253(h)(1), because there are "serious reasons for considering" that, prior to his arrival in the United States, respondent "committed a serious nonpolitical crime" within the meaning of Section 243(h)(2)(C) of the Act, 8 U.S.C. 1253(h)(2)(C).

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IMMIGRATION AND NATURALIZATION SERVICE,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Immigration and Naturalization Service, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-11a) is reported at 121 F.3d 521. The opinions of the Board of Immigration Appeals (App., *infra*, 12a-18a) and the immigration judge (App., *infra*, 19a-32a) are unreported.

JURISDICTION

The court of appeals entered its judgment on August 8, 1997. A petition for rehearing was denied

on November 26, 1997. App., *infra*, 33a. On February 17, 1998, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including March 26, 1998, and on March 17, 1998, she further extended the time for filing to and including April 25, 1998 (a Saturday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 243(h) of the Immigration and Nationality Act of 1952, as in effect when this case arose, 8 U.S.C. 1253(h), is set forth at App., *infra*, 34a-35a.

STATEMENT

1. Under the Immigration and Nationality Act of 1952 (INA), the term "refugee" means an alien who has "a well-founded fear of persecution" on account of the alien's race, religion, nationality, membership in a particular social group, or political opinion. INA § 101(a)(42)(A), 8 U.S.C. 1101(a)(42)(A). An alien who is found to be a refugee is statutorily eligible for asylum, but the decision whether to grant asylum to an eligible alien is "in the discretion of the Attorney General." INA § 208(a), 8 U.S.C. 1158(a).[1] See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 428 n.5 (1987).

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[1] Section 208 of the INA was substantially revised by Section 604(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-691. Section 208(a), prior to its amendment by IIRIRA, provided that an "alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee." 8 U.S.C. 1158(a). Although Section 208(b)(1), as amended by IIRIRA, deleted the phrase "in the discretion of the Attorney General," the text of the amendment continues to delegate to the Attorney General the discretionary authority to grant or deny asylum. See IIRIRA § 604(a), 110 Stat. 3009-691 ("The Attorney General *may* grant asylum to an alien * * * if the Attorney General determines that such alien is a refugee.") (emphasis added). The current regulations further reinforce the discretionary nature of the authority, delegating it to specified subordinates of the Attorney General. 8 C.F.R. 208.14(a) and (b); 62 Fed. Reg. 10,316 (1997). The IIRIRA amendments also specify six categories of aliens who no longer may be granted asylum; one of those categories bars asylum for an alien "if the Attorney General determines that * * * there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States." § 604(a), 110 Stat. 3009-691, 8 U.S.C. 1158(b)(2)(A)(iii) (Supp. II 1996). That prohibition parallels the one at issue in this case for withholding of deportation. See pages 4-5, *infra*. The IIRIRA amendments to Section 208 apply to asylum applications filed on or after April 1, 1997. IIRIRA § 604(c), 110 Stat. 3009-694.

In addition, Section 243(h)(1) of the INA mandates the withholding of deportation of an alien to a country "if the Attorney General determines" that the alien's "life or freedom would be threatened" there on account of any of the five enumerated grounds. 8 U.S.C. 1253(h)(1).[2] In order to be entitled to withholding of

[2] Section 243 of the INA, 8 U.S.C. 1253, was revised in its entirety by Section 307 of IIRIRA, 110 Stat. 3009-612. Effective April 1, 1997, the provisions relating to withholding of deportation found in former Section 243(h) of the INA are now found in new Section 241(b)(3) (to be codified at 8 U.S.C. 1231(b) (Supp. III 1997)), as added by Section 305(a) of IIRIRA, 110 Stat. 3009-602. In this brief, we shall refer to the withholding of deportation provisions as they were set forth in former Section 243(h) of the INA, which applies to this case.

Prior to the enactment of IIRIRA, a new paragraph (3) was added to Section 243(h) of the INA by Section 413(f) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1269. That new paragraph (3) stated that, notwithstanding any other provision of

deportation under that provision, an alien must establish a "clear probability of persecution." *INS* v. *Stevic*, 467 U.S. 407, 430 (1984). Section 243(h)(1) of the INA implements Article 33 of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 (*reprinted in* 19 U.S.T. 6259). Although the United States is not a signatory to the Convention itself, in 1968 it acceded to the United Nations Protocol Relating to the Status of Refugees, Jan 31, 1967, 19 U.S.T. 6223, which bound the parties to comply with Articles 2 through 34 of the Convention, 19 U.S.T. 6264-6276. See *Stevic*, 467 U.S. at 416; *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 169 & n.19 (1993).

Paragraph (2) of Section 243(h) of the INA provides that the withholding relief available under paragraph (1) "shall not apply" to an alien "if the Attorney General determines," *inter alia*, that "there are serious

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law, paragraph (1) of Section 243(h) shall apply to an alien "if the Attorney General determines, in the discretion of the Attorney General," that (A) such alien's life or freedom would be threatened (on account of political opinion, etc.) in the country to which the alien would be deported, and (B) "the application of paragraph (1) to such alien is necessary to ensure compliance with the 1967 United Nations Protocol Relating to the Status of Refugees." 110 Stat. 1269. That amendment took effect as of the date of enactment (April 24, 1996) and applied "to applications filed before, on, or after such date if final action has not been taken on them before such date." AEDPA § 413(g), 110 Stat. 1270. The new paragraph (3) of Section 243(h) was inapplicable to this case because the final decision of the BIA was rendered on March 5, 1996 (App., *infra*, 12a), before the enactment of AEDPA. Paragraph (3) was not carried forward in the revision of the withholding of deportation provisions made by IIRIRA, which are now contained in Section 241(b) of the INA and became effective on April 1, 1997.

reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States." 8 U.S.C. 1253(h)(2)(C). That exclusion from eligibility is based on a virtually identical exclusion in Article 1F(b) of the Convention, 19 U.S.T. 6264.

2. Respondent is a native and citizen of Guatemala. While a college student in his hometown, Jutiapa, Guatemala, he was a member and leader of the local student union, a group of about 100 students, called Estudiante Syndicato (ES). As a member of that group from 1989 to 1992, he personally participated in at least ten bus burnings to protest increases in bus fares and the Guatemalan government's seeming inaction in investigating the alleged disappearances of student leaders. Wearing masks to hide their identities, respondent and his cohorts stopped public buses and, when passengers did not cooperate by getting off, they stoned the passengers, hit them with sticks, or tied them up with ropes. The buses were then doused with gasoline and set on fire. In further protest against the government, respondent also vandalized privately owned shops, forcibly evacuating the stores by beating the customers, breaking windows, and destroying merchandise. App., *infra*, 13a-14a, 17a, 22a-23a.

3. Respondent entered the United States without inspection in 1993. App., *infra*, 20a. In 1994, pursuant to Section 241(a)(1)(B) of the INA, 8 U.S.C. 1251(a)(1)(B), the INS charged him with deportability for illegal entry. In November 1994, respondent appeared before an immigration judge and, through counsel, conceded deportability. App., *infra*, 20a. He applied for asylum and withholding of deportation, claiming that if he was returned to Guatemala he would be harmed on

account of his political opinions and related activities. *Ibid.*

After a hearing, an immigration judge granted respondent's applications for asylum and withholding of deportation, finding the requisite well-founded fear and threat of reprisal for his political activities. App., *infra*, 19a-32a. With respect to asylum, the immigration judge found that respondent was a refugee (and therefore statutorily eligible for asylum) because he was threatened with harm and death for his political protests, *id.* at 28a-30a, and the immigration judge exercised his discretion by granting respondent asylum because, in his view, respondent's favorable factors outweighed his criminal acts in Guatemala. *Id.* at 30a-31a. The immigration judge similarly found respondent entitled to withholding of deportation, finding a clear probability of persecution if he was returned to Guatemala, based on his political opinions as a student leader. *Id.* at 31a-32a.

4. The Board of Immigration Appeals (BIA) sustained the INS's appeal and ordered respondent deported to Guatemala. App., *infra*, 12a-18a.[3] The BIA held that respondent is ineligible for withholding of deportation under the "serious nonpolitical crime" exception in Section 243(h)(2)(C) of the INA. The BIA found that respondent's actions in Guatemala "were serious enough to affect the lives of innocent bus passengers, shop owners and their customers," and that the ES, of which respondent was a leader, "added to the violent atmosphere in Guatemala by burning buses, destroying shops, and stoning, binding, and

[3] Respondent never filed a brief with the BIA, although his request for an extension of time to file one was granted. Admin. R. 15-21.

beating civilians unwilling to cooperate." *Id.* at 17a. The BIA further concluded that "the criminal nature of [respondent's] acts outweigh their political nature," reasoning that although the ES "had a political agenda"—opposition to increased bus fares and seeming inaction in the investigation of student deaths—"[t]he ire of the ES manifested itself disproportionately in the destruction of property and assaults on civilians." *Id.* at 18a. Having found that respondent was barred from withholding of deportation because of his serious nonpolitical crimes in Guatemala, the BIA found no need to address the question of his threshold statutory eligibility for that relief—*i.e.*, whether he had established a clear probability of persecution if he was returned to Guatemala. *Ibid.*[4]

With respect to asylum, the BIA, without deciding respondent's statutory eligibility, denied asylum on discretionary grounds. App., *infra*, 17a-18a. The BIA concluded that "the nature of [respondent's] acts against innocent Guatemalans lead[s] us to find that he is unworthy of a favorable exercise of discretion for a grant of asylum." *Id.* at 17a.

5. a. A divided panel of the court of appeals reversed and remanded to the BIA. App., *infra*, 1a-11a. Applying a *de novo* standard of review with respect to the BIA's interpretation of the statutory provisions governing eligibility for withholding of

[4] The BIA rejected the INS's argument that respondent's criminal actions in Guatemala constituted terrorist acts under Section 212(a)(3)(B)(ii) of the INA, 8 U.S.C. 1182(a)(3)(B)(ii), and that he therefore is a danger to the security of the United States, which constitutes a separate bar to withholding of deportation under Section 243(h)(2)(D) of the INA. App., *infra*, 17a.

deportation, *id.* at 3a, the court held that the BIA had committed three legal errors in finding respondent to be statutorily barred from withholding of deportation under Section 243(h)(2)(C). *Id.* at 4a-7a.

First, the court believed that the BIA had failed to weigh the criminal nature of respondent's acts against their political character. Relying on the *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol on the Status of Refugees* (January 1988), prepared by the United Nations High Commissioner for Refugees (*UNHCR Handbook*), the court stated that it is necessary to consider whether the acts were "committed out of genuine political motives and not merely for personal reasons or gain," and whether there was "a close and direct causal link between the crime[s] committed and [their] alleged political purpose and object." App., *infra*, 4a-5a (quoting *UNHCR Handbook* ¶ 152). The court characterized respondent's acts of burning buses, vandalizing private property, and beating civilians with sticks as "crimes against property" and "minor assaults and batteries," *id.* at 4a, and it expressed the view that respondent and the ES had no personal motivation or gain. *Id.* at 5a. The court also expressed the view that "forceful measures" may be necessary to draw a government's attention to a protest when the government is an accomplice or accessory to terrorist measures. *Ibid.* Noting that respondent's tactics were successful in attracting the Guatemalan government's attention, the court found that the BIA "should have considered the political necessity and success of [respondent's] methods" in determining whether his actions were serious non-political crimes. *Id.* at 5a-6a.

Second, the court of appeals concluded that the BIA failed to consider whether respondent's crimes were "grossly out of proportion to the alleged objective" or involved "acts of an atrocious nature." App., *infra*, 6a (quoting *UNHCR Handbook* ¶ 152). The court compared respondent's acts to the conduct at issue in *McMullen* v. *INS*, 788 F.2d 591 (9th Cir. 1986), in which the Ninth Circuit sustained the BIA's determination that an alien was barred from withholding of deportation under Section 243(h)(2)(C) based on his involvement in "indiscriminate bombing campaigns, . . . murder, torture, and maiming of innocent civilians." App., *infra*, 6a (quoting *McMullen*, 788 F.2d at 597). In the court's view, repondent's acts here "fall far short" of the kind of atrocities in *McMullen*. *Ibid.*

Third, the court of appeals held that the BIA "erred as a matter of law" in failing to consider the severity of the persecution that respondent might suffer if he is returned to Guatemala. App., *infra*, 6a. Quoting paragraph 156 of the *UNHCR Handbook*, which advises that "[i]f a person has well-founded fear of very severe persecution, * * * a crime must be very grave in order to exclude him," and citing respondent's testimony that he had received death threats because of his political activism, the court held that the BIA was required to balance respondent's admitted offenses in Guatemala against the danger to him of death if he is returned to that country. App., *infra*, 6a-7a.

b. The court of appeals likewise vacated the BIA's discretionary denial of asylum and remanded that issue for reconsideration by the BIA. App., *infra*, 7a. The court pointed out that the BIA based the denial of asylum "solely on [respondent's] activities as a

student in Guatemala." *Ibid.* Noting that it had found that the BIA had committed "errors of law" in its analysis of respondent's eligibility for withholding of deportation based on those same activities, the court remanded for the BIA "to reconsider whether [respondent] should be granted asylum." *Ibid.*

c. Judge Kleinfeld dissented. App., *infra*, 7a-11a. While acknowledging that respondent's crimes were not "atrocious," he pointed out that under *McMullen*, a crime need not be atrocious to bar withholding, because the mandatory bar is also triggered if the crime is "disproportionate to the objective." *Id.* at 7a-8a (quoting *McMullen*, 788 F.2d at 595). Here, Judge Kleinfeld reasoned, the BIA could indeed reasonably conclude, based on respondent's own testimony (which Judge Kleinfeld set out at length, see *id.* at 8a-10a) that respondent's crimes were disproportionate to his political objectives. *Id.* at 10a.

Judge Kleinfeld stressed that respondent's acts of stoning and beating civilians "were neither peaceful nor directed at the government" but rather "were violent, and directed at uninvolved people," App., *infra*, 8a, and he disagreed with the majority's characterization of "[b]eating people with sticks and stoning them" as "minor" assaults and batteries. *Id.* at 10a. He continued:

> It is hard to imagine a band of masked young men, angry enough to burn buses, being especially gentle and kind as they stone people, hit them with "sticks," and tie them up. * * * The shopkeepers, not their inanimate inventory, were the victims of having their stores trashed. Nor is it evident to me why burning buses and trashing stores is proportional to a protest largely directed at bus fares. (When he testified, [respondent] sometimes forgot to mention that his group was also upset about disappearances.)

Id. at 10a-11a. Judge Kleinfeld then concluded: "The United States should be a haven for innocent people fleeing persecution. It should not be a haven for thugs." *Id.* at 11a.[5]

REASONS FOR GRANTING THE PETITION

The court of appeals plainly erred in reversing the Board of Immigration Appeals' determination that respondent is statutorily barred from eligibility for withholding of deportation under Section 243(h)(2)(C) of the Immigration and Nationality Act (INA) because there are serious grounds for considering that he committed serious nonpolitical crimes in Guatemala. The BIA properly concluded that the criminal nature of respondent's activities—burning buses, beating and stoning innocent civilians and tying them with ropes, and vandalizing stores—outweighed whatever political component those activities might have had. In reversing the BIA's ruling and characterizing respondent's crimes as only "minor," the court of appeals substantially intruded upon the authority and judgment of the Attorney General in administering the INA and applying those provisions of the Act that govern the context-specific and often sensitive determination of whether an alien who engaged in criminal conduct abroad should be granted safe haven in this country.

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[5] On November 26, 1997, the court of appeals denied the INS's petition for rehearing and suggestion of rehearing en banc. App., *infra*, 33a.

The court of appeals' ruling that the Attorney General must balance the seriousness of the crime she has reason to believe the alien committed against the seriousness of the persecution he might face upon return finds no support in the text of Section 243(h)(2)(C) and disregards the BIA's authoritative interpretation to the contrary. It also squarely conflicts with the Eleventh Circuit's decision in *Garcia-Mir* v. *Smith*, 766 F.2d 1478 (1985) (per curiam), cert. denied *sub nom. Marquez-Medina* v. *Meese*, 475 U.S. 1022 (1986). The court of appeals' other rulings likewise fail to respect the BIA's judgment regarding the nexus and proportionality of criminal conduct to political objectives, and they improperly minimize an alien's violent acts against innocent civilians simply because those acts were thought to be "necessary" to get the attention of a foreign government and they turned out to have been "successful" in doing so. The humanitarian relief of withholding of deportation was not intended to reward such conduct aimed at innocent civilians.

The numerous errors by the court below will now be magnified in light of the amendments made by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which extends to asylum cases the same bar to relief based on serious grounds for considering that the alien committed a serious nonpolitical crime before coming to the United States. The Ninth Circuit's decision in this case therefore warrants review by this Court.

1. As an initial matter, the court of appeals erred in reviewing *de novo* the BIA's interpretation of the statutory provisions governing withholding of deportation, rather than deferring to the BIA's judgment. See App., *infra*, 3a. The BIA found respondent ineligible for withholding of deportation under Section 243(h)(2)(C) of the INA, based on the nature of his criminal activies in Guatemala. Deference to the judgment of the BIA, on behalf of the Attorney General, is especially warranted under that provision, because Section 243(h)(2)(C) bars an alien from eligibility if "the Attorney General determines" that "there are serious reasons for considering" that he committed a serious nonpolitical crime outside the United States. That formulation (as opposed to one that looks to whether the alien *did* commit a crime and whether that crime *was* nonpolitical) makes it clear both that the determination is for the Attorney General to make and that her *characterization* of the conduct (whether she finds "serious reasons for considering" it to be nonpolitical) is critical. See *Pierce* v. *Underwood*, 487 U.S. 552, 559 (1988); cf. *Webster* v. *Doe*, 486 U.S. 592, 600 (1988).

The background of Section 243(h) reinforces that conclusion. Section 243(h) was enacted in the form applicable to this case in the Refugee Act of 1980 (Pub. L. No. 96-212, § 203(e), 94 Stat. 107), which basically conformed Section 243(h) to the United Nations Protocol and Convention Relating to the Status of Refugees. See *INS* v. *Stevic*, 467 U.S. 407, 421 (1984); *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 169 & n.19 (1993). The exclusion in Section 243(h)(2)(C) of the INA, at issue here, was drawn directly from a virtually identical exclusion in Article 1F(b) of the Convention, 19 U.S.T. 6264. See page 16, *infra*.

The *UNHCR Handbook* states (at ¶ 149) that the competence to decide whether the exclusions from eligibility for *nonrefoulement* apply rests with the contracting State in whose territory the alien seeks recognition of his refugee status, and it stresses that

that State need not have firm proof, only "serious reasons for considering," that a ground for exclusion exists. Furthermore, as the Attorney General explained in the administrative decision that was before this Court in *INS* v. *Doherty*, 502 U.S. 314 (1992), "[i]n practice, characterization of an offence as 'political' is left to the authorities of the state," and "the function of characterization itself is [evidently] one in which political considerations will be involved." *Deportation Proceedings for Joseph Patrick Thomas Doherty*, 13 Op. Off. Legal Counsel 1, 23 (1989) (quoting G. S. Goodwin-Gill, *The Refugee in International Law* 35 (1983)), rev'd on other grounds, *Doherty* v. *U.S. Dep't of Justice, INS*, 908 F.2d 1108 (2d Cir. 1990), rev'd, 502 U.S. 314 (1992).

The origins of Section 243(h)(2)(C) thus heighten the degree of deference that would in any event be owed to the Attorney General's interpretation and application of Section 243(h) under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 842-845 (1984). See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 448 (1987) ("There is obviously some ambiguity in a term like 'well-founded fear' which can only be given concrete meaning through a process of case-by-case adjudication," in which "the courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program."). The BIA's decision here manifestly rests on a reasonable interpretation and application of Section 243(h)(2)(C), and it therefore should have been sustained by the court of appeals. Instead, reviewing the matter *de novo*, the court of appeals substituted its judgment for that of the BIA.

2. The court of appeals' disregard for the BIA's authoritative interpretation of Section 243(h)(2)(C) is reflected in its holding that the BIA must balance the severity of possible persecution against the seriousness of the criminal conduct in which the alien is believed to have engaged. App., *infra*, 6a-7a. The BIA has specifically rejected that approach under Section 243(h)(2)(C):

> [W]e reject any interpretation of the phrase * * * "serious nonpolitical crime" in section[] 243(h)(2) * * * (C) which would vary with the nature of evidence of persecution. We cannot find that the language and framework of section 243(h) supports such an approach, which would in effect transform a statutory exclusionary clause into a discretionary consideration. Moreover, it is presupposed that all persons barred from relief by the provisions of section 243(h)(2) can demonstrate a clear probability that their life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion.

In re Rodriguez-Coto, 19 I. & N. Dec. 208, 209-210 (B.I.A. 1985) (footnote omitted).

The court of appeals' balancing requirement also cannot be reconciled with the text of Section 243(h)(2)(C), which states that the provision for withholding of deportation in paragraph (1) "*shall* not apply to any alien" if the Attorney General has serious reasons for considering that the alien has committed a serious nonpolitical crime prior to arriving in the United States. 8 U.S.C. 1253(h)(2)(C) (emphasis added); see *United States* v. *Monsanto*, 491 U.S. 600, 607 (1989) ("shall" denotes a mandatory intent). By choosing to

cast the statutory bar to withholding in mandatory terms, Congress struck what it determined to be the appropriate balance; the court of appeals erred in directing the BIA to strike a different balance, taking into account the severity of possible persecution.

The mandatory nature of the exception to withholding also is consistent with the text of the Convention. The text of the statutory "serious non-political crime" exception in the INA is essentially the same as the text of the parallel provision of the Convention. Article I.2 of the Protocol, 19 U.S.T. 6225, states that the term "refugee" generally means any person within the definition of Article 1 of the Convention. In defining "refugee" in Article 1, the Convention in turn specifies that its provisions "shall not apply to any person with respect to whom there are serious reasons for considering that * * * (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee." Convention, Art. 1F(b), 19 U.S.T. 6264.

The court below relied on the *UNHCR Handbook* in holding that the BIA "erred as a matter of law" in failing to balance the seriousness of the crimes respondent committed against the seriousness of the persecution he might face. App., *infra*, 6a-7a. This Court, however, already has held that the *UNHCR Handbook* is not dispositive of legal issues arising under the INA. Although the *Handbook* is "useful in giving content to the obligations that the Protocol establishes," this Court has recognized that it does not have "the force of law or in any way bind[] the INS." *Cardoza-Fonseca*, 480 U.S. at 439 n.22. Rather, as we have explained above, it is to the Attorney General that Congress has assigned the authority and

responsibility to construe and administer the Act of Congress at issue here. See 8 U.S.C. 1103(a) (although the INA and other laws assign some responsibilities to other officers, the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling"); *Haitian Ctrs. Council*, 509 U.S at 171-173.

The Ninth Circuit's ruling on this point also creates a square conflict with the Eleventh Circuit's ruling in *Garcia-Mir* v. *Smith*:

> Plaintiffs' contention is based on their mistaken belief that before an alien may be denied withholding of deportation or asylum under 8 U.S.C. § 1253(h)(2) or 8 C.F.R. § 208.8(f), the agency must balance the degree of persecution which an alien will face if deported against the seriousness of the alien's past criminal activity. * * * Both this court and the INS have previously rejected the balancing test.

766 F.2d at 1487 n.10.[6] Resolution of this circuit conflict is important. If left uncorrected, the court of

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[6] The Ninth Circuit's holding below also is inconsistent with the recognition (both within and beyond the Ninth Circuit) that the other bars to withholding set forth in Section 243(h)(2) are mandatory and do not require any balancing of the severity of potential persecution against the seriousness of the crime. *E.g.*, *Ramirez-Ramos* v. *INS*, 814 F.2d 1394 (9th Cir. 1987) (expressly rejecting balancing test under Section 243(h)(2)(B), which bars relief for aliens who, having been convicted of a particularly serious crime, constitute a danger to the community of the United States; reasoning that Congress already struck the balance when it couched the statutory exception in mandatory terms); *Castro-O'Ryan* v. *INS*, 847 F.2d 1307, 1314 (9th Cir. 1987) (Section 243(h)(2)(B) exception for drug conviction is absolute bar to withholding); *Choeum* v. *INS*, 129

appeals' decision requiring application of a balancing test that the BIA has rejected would frustrate the Attorney General's ability to administer withholding of deportation uniformly across the country.

3. There likewise is no basis for the court of appeals' conclusion that the BIA committed other errors of law in determining that respondent is barred from eligibility for withholding of deportation under Section 243(h)(2)(C).

a. In *In re McMullen*, 19 I. & N. Dec. 90, 97-98 (B.I.A. 1984), the BIA identified factors it regarded as relevant in determining whether an alien's criminal acts constitute serious nonpolitical crimes:

> In evaluating the political nature of a crime, we consider it important that the political aspect of the offense outweigh its common-law character. This would not be the case if the crime is grossly out of proportion to the political objective or if it involves acts of an atrocious nature.

The Ninth Circuit affirmed the BIA's decision in *McMullen*, concluding that "the BIA's interpretation of [Section 243(h)(2)(C)] is consistent with the Convention, and thus consistent with congressional intent." *McMullen* v. *INS*, 788 F.2d 591, 596 (9th Cir. 1986). The Ninth Circuit expressed the view that a crime may properly be regarded as a serious nonpolitical crime if the act lacks a genuine political motive, is not directed to modifying the political organization or structure of the state, lacks a direct causal link to the political purpose and object, is disproportionate to the objective, or is atrocious

F.3d 29, 40-43 (1st Cir. 1997) (applying Section 243(h)(2)(B)); *Hamama* v. *INS*, 78 F.3d 233, 238-240 (6th Cir. 1996) (same).

or barbarous. *Id.* at 595. The court of appeals in *McMullen* also rejected the contention that an act is a political crime as long as it is carried out during an insurrection or revolution, the act is incident to or furthers the political situation, and the motive is political. *Id.* at 596-597.

In *Deportation Proceedings for Joseph Patrick Thomas Doherty*, *supra*, the Attorney General, after again reviewing the relevant considerations, concluded that a crime "should be considered a serious nonpolitical crime if the act is disproportionate to the objective, or it is 'of an atrocious or barbarous character.'" 13 Op. Off. Legal Counsel at 23 (quoting *McMullen*, 788 F.2d at 595 (quoting in turn Goodwin-Gill, *supra*, at 61)).

Application of the foregoing factors to a particular case in determining whether there is reason to consider a crime committed by an alien to be a serious nonpolitical crime largely presents questions of fact that are reviewed for substantial evidence. *Ornelas* v. *Ruiz*, 161 U.S. 502, 509 (1896) (whether a crime is a political offense is chiefly a question of fact); *McMullen* v. *INS*, 658 F.2d 1312, 1316 (9th Cir. 1981) ("factual findings under § 243(h)[(2)(C) of the INA] are subject to review under the substantial-evidence test"); INA § 106(a)(4), 8 U.S.C. 1105a(a)(4) (factual findings made by the BIA are to be reviewed for substantial evidence); INA § 243(h)(2), 8 U.S.C. 1253(h)(2) (providing that it is the Attorney General's "determin[ation]" that controls.)[7]

[7] A finding of "serious reasons for considering" that an alien has committed serious nonpolitical crimes under Section 243(h)(2)(C) is essentially a finding of probable cause. *McMullen*, 788 F.2d at 598 & n.2, 599.

b. In this case, the court of appeals failed to give due deference to the BIA's determination and improperly substituted its judgment in place of the BIA's factual finding that respondent had committed serious nonpolitical crimes. The BIA described in detail respondent's criminal conduct in Guatemala and acknowledged that he and the ES had a political agenda. App., *infra*, 13a-15a, 17a-18a. It determined, however, that the criminal nature of his acts "outweighed" their political character. *Id.* at 17a-18a. The BIA specifically found respondent's acts disproportionate to his stated political objective, concluding that "[t]he ire of the ES manifested itself disproportionately in the destruction of property and assaults on civilians." *Id.* at 18a. That finding makes it clear that there was no "close and direct causal link" (*Doherty*, 13 Op. Off. Legal Counsel at 23) between respondent's acts directed at ordinary, uninvolved civilians and his protest against the government and its official instrumentalities.

Thus, there is no basis for the court of appeals' view (see App., *infra*, 4a-5a) that the BIA did not consider the political objectives of respondent's conduct. Nor could the court reasonably conclude that the BIA failed to consider the connection between, and proportionality of, respondent's acts to his political objectives.

c. The court of appeals' also erred in holding that the BIA should have considered "the political necessity and success" of respondent's acts when determining the causal link of those acts to his political purpose and objective. App., *infra*, 5a. The court of appeals' focus on the necessity and success of the violent acts seriously distorted the "causal link" factor. The court seemed to believe that because respondent's methods proved to be successful (and perhaps necessary) in attracting the government's attention and the guerrillas' enmity, his violence against innocent civilians should be excused under this Nation's immigation laws. *Ibid.* The court cited no authority (and there is no such suggestion in the INA or the United Nations Convention) to support its holding that consideration of "the political necessity and success" of criminal acts is required as a separate factor in determining whether serious nonpolitical crimes have been committed.

Moreover, the court's focus on the "necessity and success" of the violent acts, when coupled with its particular emphasis on political motive, is inconsistent with the BIA's authoritative administrative interpretation, which focuses on the closeness of the causal link between the *nature* of the acts committed and the political objective sought. Instead, the court gave great weight to the fact that guerrilla warfare was ongoing, that respondent acted from a political motive, and that his actions were necessary to, and succeeded in advancing, his particular role in the rebellion. That is essentially the approach that was rejected by both the BIA and the Ninth Circuit itself in the *McMullen* case. See 788 F.2d at 596-597.

The court's "necessity and success" reasoning also ignores the difference between violent acts directed against ordinary citizens and such acts directed against official instrumentalities of the state. Under the court's approach, as long as the tactics are necessary to achieve the success of an ultimate political goal, the required causal link would be present, even though the acts are directed against innocent civilians. Here again, the court of appeals deviated from the BIA's articulation of the serious

nonpolitical crime standard. See also *McMullen*, 788 F.2d at 597-598 (violent acts against civilians are insufficiently linked to the political objective to qualify as political crimes).

d. Finally, the court of appeals erred in holding that the BIA should have considered whether respondent's crimes were atrocious. Under the BIA's approach, and the Attorney General's decision in *Doherty* (see 13 Op. Off. Legal Counsel at 23, quoted at page 14, *supra*), proportionality and atrociousness are alternative grounds on which a crime may be determined to be nonpolitical. Thus, acts that are solely disproportionate to the political objective or solely atrocious can constitute serious nonpolitical crimes, even if they are politically motivated. In this case, the BIA found that respondent's acts were not so atrocious as to rise to the level of terrorism, but it concluded that his violence against civilians was disproportionate to his political objectives. In contrast, the court of appeals equated "disproportionate" with "atrocious" and produced a test that, if carried to its logical conclusion, would require that an alien's acts amount to terrorism before the serious nonpolitical crime bar to withholding could be triggered. App., *infra*, 6a. As the dissent below recognized, that result is inconsistent with the Ninth Circuit's own precedent in *McMullen*: "[t]he crime need not, to exclude asylum, be 'atrocious' * * * if it 'is disproportionate to the objective.'" *Id.* at 7a-8a (quoting *McMullen*, 788 F.2d at 595).

4. The decision of the court of appeals warrants review by this Court. As we have explained above, the holding below that the Attorney General, before determining that an alien is barred from the relief of withholding of deportation under Section 243(h)(2)(C),

must balance the seriousness of the crime the alien committed against the severity of the persecution he may face squarely conflicts with the Eleventh Circuit's ruling in *Garcia-Mir* that no such balancing is required. Resolution of that conflict takes on added importance now because the "serious nonpolitical crime" bar to withholding of deportation has been extended by IIRIRA to asylum cases as well, beginning April 1, 1997. INA § 208(b)(2)(A)(iii), 8 U.S.C. 1158(b)(2)(A)(iii) (Supp. II 1996), as amended by IIRIRA § 604(a), 110 Stat. 3009-691. The other rulings by the court of appeals likewise impinge upon the authority of the Attorney General to determine the circumstances in which criminal conduct in another country should be considered to constitute a serious nonpolitical crime that gives rise to exclusion from eligibility for withholding of deportation (and, now, asylum). Those other rulings also inappropriately expand the availability of special humanitarian relief, including the mandatory relief of withholding of deportation, to persons who engage in violent conduct directed at innocent civilians.

Over the years, asylum and withholding of deportation have taken on increasing prominence under the INA. In November 1985, the INS's petition for a writ of certiorari in *Cardoza-Fonseca* noted (at 19 n.10) that in fiscal year 1984, 11,000 asylum applications were filed with the Executive Office of Immigration Review (EOIR). As of March 1998, there were nearly 33,800 asylum and withholding cases pending in EOIR. The availability of that relief to aliens who engaged in serious criminal activity before coming to this country therefore presents important issues in

the ongoing administration of the Nation's immigration laws.[8]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1998

[8] After reversing and remanding the BIA's determination that respondent was barred from receiving the relief of withholding of deportation, the court of appeals vacated the BIA's discretionary denial of asylum and remanded that issue to the BIA for reconsideration as well. The court's only reason for doing so was that the BIA, in denying respondent asylum in the exercise of its discretion, had relied exclusively on his activities in Guatemala. App., *infra*, 7a. Because the court set aside the BIA's determination that those activities constituted serious nonpolitical crimes, the court apparently believed that it was appropriate for the BIA to reconsider its asylum decision in light of whatever revised determination it might make with respect to withholding of deportation. If this Court grants certiorari and reverses the court of appeals' holding on the withholding of deportation issue, the sole basis for the court of appeals' asylum ruling will necessarily be eliminated as well.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-70267

JUAN ANIBAL AGUIRRE-AGUIRRE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

[Argued and Submitted May 7, 1997
Decided Aug. 8, 1997]

Before: PREGERSON, JOHN T. NOONAN, JR., and KLEINFELD, Circuit Judges.

NOONAN, Circuit Judge:

Juan Anibal Aguirre-Aguirre (Aguirre) petitions for review of the order of the Board of Immigration Appeals (the Board) finding him ineligible for withholding of deportation and asylum. Holding that the Board has erred as a matter of law in its interpretation of 8 U.S.C. § 1253(h)(2)(C) (1994) ("serious nonpolitical crime"), we grant the petition and remand.

PROCEEDINGS

Aguirre entered the United States without inspection. Before the Immigration Judge (IJ) he conceded deportability and applied for asylum and withholding of deportation. He testified to his activities in Guatemala as a student leader, among them the burning of ten buses and the messing up of several stores as a way of demonstrating against the ruling government of Guatemala and in particular against its raising of student fares on the buses (an element of student transportation) and its indifference to, and possible complicity in, the mysterious disappearances and deaths of political activists. Carefully reviewing Aguirre's testimony and finding it wholly believable, the IJ granted both asylum and withholding of deportation.

On appeal by the Immigration and Naturalization Service (the Service), the Board reversed. The Board disagreed with the Service's contention that Aguirre had engaged in terrorist acts as defined by 8 U.S.C. § 1182(a)(3)(B)(ii) (1994). The Board also disagreed with the Service's contention that Aguirre was a danger to the security of the country under 8 U.S.C. § 1253(h)(2)(D) (1994) and 8 C.F.R. § 208.14(c)(3). However, the Board held that the "nature of his acts against innocent Guatemalans" made him unworthy of a favorable exercise of discretion and that therefore it was unnecessary to address his statutory eligibility for asylum. The Board further held that "the criminal nature of the respondent's acts outweigh their political nature" and that he was consequently barred from withholding of deportation without the Board needing to address the issue of his statutory

eligibility for this relief. In reaching its decision the Board did not consider what Aguirre might suffer if deported to Guatemala, nor did the Board weigh the character of Aguirre's crimes in relation to his political objectives, nor did the Board follow Ninth Circuit precedent in this area. The Board also denied Aguirre voluntary departure.

Aguirre petitions for review.

ANALYSIS

This case depends upon the construction of a single statutory provision, 8 U.S.C. § 1253(h)(2)(C) (1994), declaring that an alien is not entitled to withholding of deportation if the Attorney General determines that "there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States." We review de novo the Board's interpretation of the requirements for establishing eligibility for withholding of deportation. *Abedini v. INS*, 971 F.2d 188, 190-91 (9th Cir. 1992).

The statute at issue here has been considered by us in *McMullen v. INS*, 788 F.2d 591 (9th Cir. 1986). Construing the statute, we found that Congress "intended the nonpolitical crimes exception to withholding of deportation to be consistent with the Convention [Relating to the Status of Refugees, 189 U.N.T.S. 150 (1951)] and Protocol [Relating to the Status of Refugees, 19 U.S.T. 6223 (1968)]." *McMullen*, 788 F.2d at 595. The United States is a party to the Protocol, and the Protocol, Article 1.2, defines the term "refugee" as "any person within the definition of Article 1 of the Convention." The

relevant definition in Article 1F of the Convention excludes a person who "has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee."

In April, 1996 the Immigration and Nationality Act, 8 U.S.C. 1253(h), was amended by providing that an alien must be granted withholding of deportation if such grant was "necessary to ensure compliance with the 1967 United Nations Protocol Relating to the Status of Refugees." Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, § 413(f), 110 Stat. 1214, 1269 (1996) (adding 8 U.S.C. § 1253(h)(3)). It is unnecessary for us to determine whether this statute applies to Aguirre's case because under McMullen we are already bound to apply the Protocol in decisions regarding the withholding of deportation.

Interpreting and applying the statute in the light of *McMullen* and the Protocol, we find that the Board committed errors of law. First, the Board looked only at the offenses of Aguirre, which at common law would be considered crimes against property (the burning of the buses and the throwing of store merchandise on the floor) and minor assaults and batteries (the means taken to get reluctant bus passengers off the buses before their destruction). The Board did not consider these offenses in relation to Aguirre's declared political objectives. Under the Protocol the Board should have first determined the nature and purpose of Aguirre's acts, that is whether they were "committed out of genuine political motives and not merely for personal reasons or gain," as stated by an authoritative commentary on the Convention and Protocol. United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* ¶ 152 (1979) [hereafter UNHCR, *Handbook*]. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 438-39, 107 S.Ct. 1207, 1216-17, 94 L.Ed.2d 434 (1987) (relying on *Handbook* for definition of "refugee"). The Board should have further considered whether there is "a close and direct causal link between the crime[s] committed and [their] alleged political purpose and object." UNHCR, *Handbook*, *supra*, ¶ 152.

Aguirre's political purpose (there was no personal motivation or gain) was to challenge a government which there was reason to suspect engaged in the actual murder of its own citizens and which was certainly an accomplice in such murder by its failure to investigate the homicides and prosecute them. When you are dealing with an ass it may be necessary to move the beast by a blow on a sensitive part even though what you want to move are the feet. When you are dealing with a government which is an accomplice or an accessory to terroristic methods of government you need to use forceful measures to draw the government's attention to your protest; your political objective is a governmental response, you look for a sensitive area. Aguirre's methods, as he testified, were successful as to this objective. The government had to resort to television appeals to stop the student actions. The methods were also successful enough to earn the enmity of a rival rebel group, "the guerrillas," who resented the students' way of demonstrating against the government. The Board should have considered the political necessity and success of

Aguirre's methods, weighing their political character against their criminal content.

In making this inquiry the Board should have considered whether the acts committed were "grossly out of proportion to the alleged objective." UNHCR, *Handbook*, *supra*, ¶ 152. The political nature of the offenses would be "more difficult to accept" if they involved "acts of an atrocious nature." *Id.* The Board made its second error of law in failing to consider Ninth Circuit precedent in this regard. *McMullen* cast light on what under the law are acts of atrocious nature. They are the acts attributed to the Provisional Irish Republican Army (PIRA) which made McMullen ineligible for withholding of deportation, i.e., "indiscriminate bombing campaigns, . . . murder, torture, and maiming of innocent civilians who disagreed with the PIRA's objectives and methods." *McMullen*, 788 F.2d at 597. A comparison of what the *McMullen* court found atrocious with the acts committed by Aguirre suggests a startling degree of difference. Aguirre did not engage in indiscriminate bombing, murder, torture, or the maiming of innocent civilians. His only acts against innocent Guatemalans were the disruption of some stores and his use of methods that we would all find objectionable if practiced upon us on a bus in the United States but which fall far short of the kind of atrocities attributed to McMullen and his associates.

Third, the Board erred as a matter of law in failing to consider the persecution that Aguirre might suffer if returned to Guatemala. "If a person has well-founded fear of very severe persecution, e.g. persecution endangering his life or freedom, a crime must be very grave in order to exclude him." UNHCR,

Handbook, *supra*, ¶ 156. Aguirre testified without contradiction to the death threats that he and other student leaders had received and to the fact that several of the student leaders who had been threatened had been killed after he left the country. Aguirre could well be found to be in danger of losing his life if returned to Guatemala and therefore should be excluded for his crimes only "for the most serious reasons." Guy S. Goodwin-Gill, *The Refugee in International Law* 107 (2nd ed. 1996). The Board did not attempt to balance his admitted offenses against the danger to him of death if returned to his native land.

We review for abuse of discretion the Board's decision that Aguirre was undeserving of a favorable exercise of discretion on his claim for asylum. *Rodriguez-Matamoros v. INS*, 86 F.3d 158, 160 (9th Cir. 1996). The Board based its decision solely on Aguirre's activities as a student in Guatemala. Noting the Board's errors of law in its analysis of Aguirre's eligibility for withholding of deportation, we also remand for the Board to reconsider whether Aguirre should be granted asylum.

For these reasons we GRANT the petition and REMAND to the Board.

KLEINFELD, Circuit Judge, dissenting:

I respectfully dissent.

The BIA correctly identified the legal question, whether "the criminal nature of the respondent's acts outweigh their political nature." The crime need not, to exclude asylum, be "atrocious" (and Aguirre-Aguirre's was not) if it "is disproportionate to the

objective." *McMullen v. INS*, 788 F.2d 591, 595 (9th Cir.1986). Because the BIA opinion analyzes the question as the majority opinion says it should, the majority cannot (and does not) point to legal error. The issue is entirely one of weighing Aguirre-Aguirre's crimes against his political objectives.

Aguirre-Aguirre testified in support of his asylum claim that his) political purpose was to protest the high bus fares, and also to protest government failure to investigate disappearances and murders. The actions he took were neither peaceful nor directed at the government. They were violent, and directed at uninvolved people. Here is Aguirre-Aguirre's own description, worth reading in full, on cross examination by government counsel, of the criminal activities of which he was a leader:

> . . . we burned buses . . . . splashing with gasoline and then burned them and then burned the tires and all.
>
> Q. And were there any people on board these buses when you did this?
>
> A. No, because we would stop the bus, help all the people get out of the bus, and then because there were so many, we would just stone them and make them get away and then burn the bus.
>
> Q. To your knowledge, was anyone hurt during any of these bus burnings or stonings?
>
> . . . . .

> A. No, we just hit them if they did not want to get off the bus.
>
> Q. How did you hit them? Did you strike them with a club, or how?
>
> A. We would have sticks, you know, to hit them with, or we would just tie them with ropes. But, if they be, I mean, if they hit our, uh, bus then we get off the bus.
>
> Q. And, these people who were on the bus were just ordinary citizens of Guatemala?
>
> A. Yes.
>
> . . . . .
>
> Q. When you were burning these buses and throwing rocks and things at people, did you cover your face with a bandanna or in some other way hide your identity?
>
> A. Yes, we would cover our faces.
>
> Q. And during the times that you burned the buses, you say you also broke windows and other things?
>
> A. Yeah, we would break the windows of the stores and we would just take, I mean, uh, raid the stores. Taking everything they have.
>
> Q. So, you were, in other words, looting the stores?

A. No, we did not steal from the stores. We simply took the people out of the stores that were there. And we would throw everything on the floor.

Q. The people who were in the stores, did you treat them in a similar fashion that you treated the people on the bus, that is, throw rocks at them and hit them with sticks and tie them with ropes in order to get them to go?

A. If they did not try to do anything to us, we would not do anything to them. Because, we would always explain to the people who were there in the buses, for instance, why we were doing this and why we were protesting and doing these things, because of the high fares that the buses had. Some of them would even support us.

Could the BIA reasonably conclude that Aguirre-Aguirre's crimes were disproportionate to his political objectives? Yes indeed.

My colleagues read the evidence as "crimes against property" combined with "minor assaults and batteries." Beating people with sticks and stoning them, does not seem "minor" to me. Hitting someone on the head with a stick in the nature of a baseball bat or a stone in the nature of a brick is reasonably likely to cause brain damage. It is hard to imagine a band of masked young men, angry enough to burn buses, being especially gentle and kind as they stone people, hit them with "sticks," and tie them up. There is no reason to suppose that the sticks were like the

flexible yardsticks one gets for free at the hardware store, as opposed to baseball bats. The bus passengers, perhaps travelling to work or going home exhausted at the end of hard days, probably would not interrupt their journeys for a bunch of angry boys with little sticks. The shopkeepers, not their inanimate inventory, were the victims of having their stores trashed. Nor is it evident to me why burning buses and trashing stores is proportional to a protest largely directed at bus fares. (When he testified, Aguirre-Aguirre sometimes forgot to mention that his group was also upset about disappearances.)

Asylum law is supposed to protect innocent victims of persecution. We grossly distort it by requiring the government to give asylum to violent criminals. The United States should be a haven for innocent people fleeing persecution. It should not be a haven for thugs.

APPENDIX B

File: A70 815 341-Las Vegas Date: March 5, 1996

IN RE: JUAN ANIBAL *AGUIRRE*-AGUIRRE

Filed: Mar. 5, 1996

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Joseph W. Long, Esquire
530 South Fourth Street
Las Vegas, Nevada 89101

ON BEHALF OF SERVICE:

Richard Knuck
General Attorney

CHARGE:

Order: Sec. 241(a)(1)(B), I&N Act [8 U.S.C. § 1251(a)(1)(B)]
Entered without inspection

APPLICATION: Asylum; withholding of deportation

In a decision dated April 5, 1995, the Immigration Judge found the respondent deportable as charged, and granted his applications for asylum and withholding of deportation. The Service has appealed. The request for oral argument before the Board has been withdrawn. The appeal will be sustained.

FACTUAL BACKGROUND

The respondent is a 26-year-old native and citizen of Guatemala who entered the United States without inspection in January 1993 (Tr. at 10; Exhs. 1, 2). He has conceded deportability (Tr. at 5-6). His asylum request is based on his belief that he will be harmed in Guatemala (Tr. at 32; Exh. 2).

From 1989 until 1992, the respondent was a member of the student union at his college, the Estudeante Syndicado (ES), and was in charge of promoting student strikes (Tr. at 11-12). These strikes were prompted by government actions including raising bus fares for students and failing to investigate the deaths of students (Tr. at 12-13, 35).

The ES protests included "burning buses, breaking windows or just attacking the police, police cars." The respondent estimated that he assisted in burning approximately 10 buses. He testified that his group would stop the bus and escort the passengers off. The ES would "just stone them" or "just hit them if they did not want to get off the bus." The students "would have sticks . . . to hit [the passengers] with or we would just tie them with ropes." The ES also "trashed" some stores after removing the customers (Tr. at 13, 33-35). During these protests, the respondent's identity was hidden (Tr. at 35-36).

The respondent testified that when he watched television, students were being asked "to calm the situation" and resist involvement in the strikes. He

was unsure if the government knew of his involvement in the strikes, but he knew the government had a list of all college students and their activities (Tr. at 14). The respondent also noted that if the police found out about his involvement with the ES strikes, "they will get a judicial order and come and get [him]" (Tr. at 40).

The respondent began to receive anonymous notes telling him that the ES should halt their activities or face "whatever the consequences would bring." Two of the threatening letters were on government stationary, but unsigned, according to the respondent. Some of the letters stated that the leadership of the ES would "disappear" if the group did not cease its violent protests (Tr. at 14-15). The respondent testified that between 1989 and 1992, five ES members were killed. He suspected Guatemalan guerrillas in one incident, and the government in the other incidents (Tr. at 21-22, 24).

The respondent testified that in June or September 1992, he and a friend of his were approached by three armed men who he identified as guerrillas. The men told them that the ES had to cease their protests or "the consequences would be very bad." They also asked for the support of the ES "because they did not want to have any competition from any other group" in causing mayhem (Tr. at 22-24, 37).

The respondent testified that an uncle of his was kidnapped by the guerrillas. The respondent surmised that he was murdered by his captors because they found his military identification. The respondent acknowledged that the guerrillas were unaware

of his familial relationship with his uncle (Tr. at 25). The respondent also testified that he spent a year in Guatemala's military reserves, and fears that the guerrillas would kill him if he was caught with his military identification (Tr. at 26).

The respondent was also active with the National Central Union (NCU), a political party. He was in charge of "celebrations of the party and . . . protests against the government." He also helped organize rallies and recruit new members (Tr. at 26-27). The respondent testified that in December 1992 a member of the Guatemalan congress told him that he should cease his NCU activities or "count on the consequences." The respondent believed this statement constituted a threat to his safety, though he did not quit the UCN (Tr. at 27-28). The respondent noted that the leader of the UCN was assassinated and two of his bodyguards wounded in 1993 (Tr. at 29).

The respondent decided to leave Guatemala when another acquaintance of his in the Guatemalan congress told him that the government was planning to assassinate some students. This person thought the respondent might be among them (Tr. at 29-30, 38). The respondent is unaware if the killings ever took place, though he heard on the news that an ES leader had been killed (Tr. at 30, 38-39).

Since he has arrived in the United States, the respondent has been contacted by a former school director from Guatemala. The director told him that unidentified persons were looking for him. The respondent believes these persons could be from the

government, the guerrillas, or "a secret group that the government has" (Tr. at 30-31).

THE IMMIGRATION JUDGE'S DECISION AND THE RESPONDENT'S POSITION ON APPEAL

The Immigration Judge found that the respondent had established eligibility for a grant of asylum and for withholding of deportation based on his fear of reprisal for his political activities. He also dismissed the Service's contentions that the respondent's acts with the ES constituted crimes that triggered an automatic bar to relief from deportation.

On appeal, the Service argued that the respondent's activities were terrorist acts. It also argued that the respondent failed to establish a well-founded fear of persecution in Guatemala.

APPLICABLE LAW

In order to establish eligibility for a grant of asylum, an alien must demonstrate that he is a "refugee" within the meaning of section 101(a)(42)(A) of the Act, 8 U.S.C. § 1101(a)(42)(A). He must also demonstrate that he should be granted asylum as a matter of discretion. *See* section 208 of the Act, 8 U.S.C. § 1158; *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

In order to establish eligibility for withholding of deportation, an alien must demonstrate that his "life or freedom would be threatened . . . on account of race, religion, nationality, membership in a particular social group, or political opinion." Section 243(h)(1) of the Act, 8 U.S.C. § 1253(h)(1). The alien is barred

from establishing eligibility if "there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States." Section 243(h)(2)(C) of the Act, 8 U.S.C. § 1253(h)(2)(C). We have held that "[i]n evaluating the political nature of a crime, we consider it important that the political aspect of the offense outweigh its common-law character. This would not be the case if the crime is grossly out of proportion to the political objective . . ." *Matter of McMullen*, 19 I&N Dec. 90, 97-98 (BIA 1984), *aff'd*, 788 F.2d 591 (9th Cir. 1986).

ANALYSIS AND CONCLUSIONS

The record reflects that the respondent engaged in demonstrations against the Guatemalan government that were serious enough to attract the attention of the government and the guerrillas in that country. They were also serious enough to affect the lives of innocent bus passengers, shop owners and their customers. The ES added to the violent atmosphere in Guatemala by burning buses, destroying shops, and stoning, binding, and beating civilians unwilling to cooperate.

We disagree with the Service's contentions that the respondent has engaged in terrorist acts under section 212(a)(3)(B)(ii) of the Act, 8 U.S.C. § 1182(a)(30(B)(ii), and that he is a danger to the security of the United States. However, the nature of his acts against innocent Guatemalans lead us to find that he is unworthy of a favorable exercise of discretion for a grant of asylum. Consequently, we do not need to

address the respondent's statutory eligibility for asylum. *See INS v. Bagamasbad*, 429 U.S. 24 (1976).

We also find that the criminal nature of the respondent's acts outweigh their political nature. The respondent testified that the primary source of their displeasure from the government arose from its seeming inaction in the investigation of student deaths and in its raising of student bus fares. The ire of the ES manifested itself disproportionately in the destruction of property and assaults on civilians. Although the ES had a political agenda, those goals were outweighed by their criminal strategy of strikes violent enough to attract the attention of the main combatants in the Guatemalan conflict. Consequently, we find that the respondent is barred from withholding of deportation and do not need to address the issue of his statutory eligibility for this relief.

The Immigration Judge did not rule on the matter of voluntary departure, not did the respondent testify regarding his statutory eligibility for such relief. Our review of the record indicates that even if the respondent were statutorily eligible for such a grant, for the reasons discussed above, we would deny it in the exercise of discretion.

ORDER: The appeal is sustained.

FURTHER ORDER: The Immigration Judge's order granting asylum and withholding of deportation is vacated and the respondent is ordered deported from the United States.

signature illegible
FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
NEW YORK, NEW YORK

File No.: A 70 815 341

IN THE MATTER OF JUAN ANIBAL AGUIRRE AGUIRRE,
RESPONDENT

Filed: April 5, 1995

IN DEPORTATION PROCEEDINGS

CHARGES: Entry without inspection.

APPLICATIONS: Political asylum, withholding of deportation and voluntary departure.

ON BEHALF OF RESPONDENT:

Joseph W. Long, Esquire
530 South 4th Street
Los Vegas, Nevada 89101

ON BEHALF OF SERVICE:

Richard H. Knuck, Esquire
General Attorney, INS
Phoenix, Arizona

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 25-year-old male alien native and citizen of Guatemala who has admitted entering the United States without inspection near San Ysidro, California on January the 23rd, 1993. He was placed in deportation proceedings with issuance of an Order to Show Cause dated June the 22nd, 1994. At this proceeding, through counsel, he has admitted the factual allegations, conceded deportability and declined to name a country of deportation. Accordingly the Court will designate his country of nationality, Guatemala. Based upon the respondent's admissions deportability has been established by clear, convincing, unequivocal evidence. *Woodby v. INS*, 385 U.S. 276 (1966), 8 C.F.R. Sec. 242.14A.

Respondent has submitted an application for political asylum in which he claims he will be persecuted in Guatemala, because of his political opinions and activities there as a student leader.

An application for political asylum under Section 208 of the Act, 8 U.S.C. Sec. 1158 made after the institution of deportation proceeding shall also be considered as a request for withholding of deportation under Section 243(h)(1) of the Act, 8 U.S.C. Sec. 1253(h)(1), see 8 C.R.F. (*sic*) or [C.F.R.] Sec. 208.3B. To be eligible for political asylum, the respondent must establish that he has a well-founded fear of persecution on account of race, religion, nationality, membership in particular social group, or political opinion. *INS v. Elias-Zacarias*, 112 Supreme Court 812 (1992). On a case by case basis the asylum seeker must establish by objective evidence that persecution is a reasonable

possibility, see *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). An applicant for asylum under Section 208 of the Act has established a well-founded fear if a reasonable person in his circumstances would fear persecution or if he has been a victim of past persecution. *Matter of Chen*, Int. Dec. 3104 (BIA 1989). A reasonable person may well fear persecution even where its likelihood is significantly less than clearly probable, *Matter of Mogharrabi*, Int. Dec. 3028 (BIA June 1987), *Cardoza-Fonseca*, supra. Relief of political asylum under Section 208 is discretionary in nature. The alien must show that the alien possesses a belief or characteristic a persecutor seeks to overcome by means of punishment. The persecutor could become aware that the alien possess this belief or characteristic. The persecutor has the capability of punishing the alien. And the persecutor has an inclination to punish the alien. *Id.* at 11.

To be eligible for withholding of deportation under Section 243(h)(1) the respondent must, by a preponderance of the evidence, establish that his life or freedom would be threatened on the account of his race, religion, nationality, membership in a particular social group, or political opinion. Relief under this Section is mandatory in nature, *see Matter of Acosta*, Int. Dec. 2986 (BIA 1985), *INS. v. Stevic*, 467 U.S. 407 (1984). The respondent has submitted some various and sundry documentary evidence to include a letter from the director of his former university as well as other general country reports. The Court has considered that evidence in arriving at a decision in this case and will reference the letter later on. The respondent has also testified fully under oath before the Court in support of his application for political

asylum. He does testify that he does fear that he will be persecuted and killed if returned to Guatemala because of his political opinions and activities as a student leader in the university there in Guatemala.

In summary, his testimony is substantially as follows: that he was born in Guatemala October the 20th, 1969 and is 25 years of age. He lived his entire life in the same place in Guatemala before coming to the United States. He was a university student there studying accounting and did receive a degree, presumably in accounting, and worked for about a month as an accountant.

He was active in various student groups, to include the Syndicado, a nationwide student movement, from 1989 to 1992. He was in a leadership position and coordinated demonstrations and other activities of that group. And he promoted student strikes and disseminated information. He indicates there were a total about 22 associations under this group for a total of about a thousand people. When students were killed, when there were human rights violations and when the government took acts they did not agree with they would demonstrate. This included burning cars and buses, breaking windows of stores, throwing merchandise on the floor and attacking the police. He, himself indicates he participated in the burning of about 10 buses. The buses would be stopped, emptied of people, and if the people refused to leave they would be forcibly removed. Also in the stores the people would be asked to leave. If they did not leave they wold be forcibly removed before the store was essentially trashed. He indicated they always were masked and could not be identified by the police. And they

always explained to the people their cause, and in many cases the people supported them. He indicated that in particular they demonstrated when students were murdered and there was never an investigation or any actions taken by the government. Also some of their demonstrations occurred over the high cost of bus fares for students. He indicates the government was aware of this student group and movement, because he often saw TV appeals from the government asking the students to cease and desist such demonstrations and protests. He also indicates that the government is provided a list of all university and college students by the universities and colleges. And they from that list identify those who are outstanding leaders in the student movements. He does believe that his name is on the list, that it was provided by the director of the college, and that he is identified by the government as a student leader.

He indicates he has been threatened by three different groups, it appears, the guerrillas, the government of Guatemala, as well as right wing government support groups. He indicates that some of these threats were anonymous and he does believe they were from the government or government support right wing groups. These threats apparently were in writing, delivered to him, directing or threatening that they should stop their activities and be more peaceful or action would have to be taken against them. He understood that this was directed to the outstanding leaders on the list, that they were to stop the activities themselves and coordinating it for the student body. He indicates he received multiple threats of this nature, all in the same vein. Some of the threats said that the leaders of the student movement would

disappear unless they heeded the advice and ceased and desisted their activities. The last two threats he received were on government letterhead and said "official," but they were not signed by any person in particular. Hence, anonymous. One of the reasons he believed they were threats from the government or right wing government support groups is because they were on government letterhead.

He was also involved in the student body, the directorate, he was a vice-president of that organization for approximately six years. He worked with the faculty of the university. He received information, disseminated it to the students. He took student complaints and problems to the faculty for formal resolution. Basically he was in charge of seeing that everything at the college was maintained in order. He also notified the students in this capacity regarding demonstrations times, dates, and places, but was not in charge of the organization or execution of those demonstrations as vice-president of the student body. This group was strictly a local university college group and they were concerned with local college matters as opposed to the Syndicado. He indicates that his leadership position in both organizations was widely known and that the link between the Syndicado and the Directive was well known also.

He indicates that Syndicado members were harmed while he was there. Five members were found dead in different locations within a period of six months between 1989 and 1992. One student was kidnapped, a member of the Syndicado, and later found dead. He read about these deaths in the newspapers. The government apparently claimed that they were com-

mitted by the guerrillas, however he believes and the Syndicate believes, that the government was responsible for their deaths, because they refused to investigate or take any action regarding the discovery of the corpses.

He indicates that the guerrillas had infiltrated their group and were aware of their activities and the identity of the leaders, to include himself. In fact, he indicates, that in June or September of 1992, he and a friend were at a football field when three armed men in uniform came and told them to stop their activities or face the consequences and they were told that those consequences would be quite bad. They were readily identifiable as guerrillas. They were armed and in uniform. While the government and guerrilla soldiers wear the same uniform, they are distinguishable from their head gear. While the government military soldiers wear hats, the guerrillas wear bandannas. These three men did wear bandannas and were hence, guerrillas. These men asked the respondent to join them, the guerrillas, for a united effort. They did not want competition from the Syindacato or the student movement. He perceived the conversation of the guerrillas to mean that unless he joined with them, the Syindacato and the guerrillas united, that he would be killed. He indicated he refused to do so.

He does have a relative who was harmed by the guerrillas, and uncle was killed by the guerrillas. He had returned from the United States and went to the border with Mexico to pick up his car when he was kidnapped by guerrillas and upon discovering that he was carrying a military identification card he was killed and later his body was discovered.

He, himself, joined the military reserves and trained some three times a week, 12 times a month, and at the end of the school year would actually serve active duty for three moths. He indicated in total, he served on active duty for about one year. He indicates while this caused him no problems while he was in Guatemala, he was aware that if the guerrillas ever stopped him and found the military ID on his person that would result in his death. However, this never occurred and to the best of his knowledge apparently the guerrillas were not aware of that status.

He also was a member of the National Central Union (UCN), a political party there in Guatemala. And he was a very active member. He was in charge of party celebrations and rallies and protests against the government. He organized these activities and also helped recruit new members. On one occasion, December the 20th, 1992, he was threatened by a government official in another political party due to his activities for the UCN. He indicates this person was a member of the congress. And this person told him to stop his recruiting for UCN party and to come join this official's party, himself, or he would suffer the consequences. The respondent indicated that he took this as a threat because this was a high government official, feared by everyone. And he thought he would be harmed and that the government official would carry out that threat. In fact, he does indicate that in 1993, the leader of the UCN party was assassinated and some of his bodyguards injured. This assassination was never investigated by the government.

Finally, on January the 7th, 1993, he departed Guatemala and came to the United States. He made this decision to leave his country when a friend of his, who was a member of congress, told him that the government was planning to kill some student leaders and that he might be on the list. His friend was a high-ranking politician and knew about such matters. He believed him. This friend, this high politician, told the respondent of this because the respondent played football on a team he owned and because they were very good friends. After leaving Guatemala, from a newspaper in California, he did read that tone of the student Syindacato leaders was killed. While not from his department, from that same area. Four of the student leaders fled Guatemala January the 7th, 1993 or thereabouts as a result of this warning from the respondent's friend.

Also, after his arrival in the United States he received a letter from the director of the university, that is part of Exhibit 2 in the record of these proceedings. The director obtained his address from his family and wrote to tell him that he should stay in the United States because unidentified people had been to the University looking for the respondent. The respondent believes that they are either government or guerrilla officials, because no one else there would have any interest in finding him. And he believes that their—the government or guerilla—interest is because of his activities and political opinion as a student leader.

His family remains in Guatemala. He, himself, is unwilling to return to that country, because he fears that if he is returned the government is looking for

him as an important member and student leader and would persecute and otherwise do him harm. He also believes the guerrillas would harm him if they discovered his military affiliation.

I have observed the testimony and the demeanor of the respondent and I do find him to be a credible witness worthy of belief.

Under Section 208 of the Act, an alien may be granted asylum in the exercise of discretion if he qualifies as a refugee within the meaning of Section 101(a)(42)(A) of the Act, 8 U.S.C. Section 1101(a)(42)(A). That section does define refugee as an alien who is unable or unwilling to return to his home country because of persecution or a well-founded fear of persecution on the account of race, religion, nationality, membership in a particular social group or political opinion. The alien does bear the burden of proof to establish a well-founded fear of persecution by a preponderance of the evidence, *Matter of Acosta, supra.*, a *Matter of Exilus*, 18 I&N Dec. 276 (BIA 1982), 8 C.F.R. Section 236.3 and 242.17. *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5gh Cirs. 1982). The alien must demonstrate a likelihood that he individually will be singled out and subjected to persecution, see *Fleurinor v. INS*, 585 F.2d 129 (5th Circ. 1978).

The showing of a well-founded fear of persecution requires that the alien present some subjective evidence which establishes a realistic likelihood of persecution in his home land. An alien's own testimony in an asylum case may be sufficient without corroborataive evidence to prove a well founded fear of

persecution where that testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his fear *Matter of Mogharrabi, supra.* Otherwise stated, the test is where the evidence of record has a solid in objective facts or events which is significantly probative of the likelihood of persecution of this particular alien sufficient to establish a well-founded fear of persecution in Guatemala. *Matter of Acosta, supra. Matter of Exame*, 18 I&N Dec. 303 (BIA 1992). *Matter of Siburn*, 18 I&N Dec. 354 (BIA 1983). *INS v. Stevic, supra. INS v. Cardoza-Fonseca, supra.* *See* also *Matter of Sanchez and Escobar*, Int. Dec. 2996 (BIA 1985).

The Court does find that there is sufficient evidence to show that the respondent has a well-founded fear of persecution within the meaning of Section 208 of the Act. In this regard there is objective evidence of record that he was very much involved as a student leader and in political opinion and in political activities and that he did receive threats from the guerrillas because of this political opinion and activities. Also from what appears to be the government and/or government right wing support organizations. He is fearful for his safety because of these threats. The guerrillas are able to carry out such threats as they please with impunity. The government is unable to provide protection for the respondent from such groups nor are they willing to investigate or take any actions once such threats are carried out. On the other hand, the government itself has threatened the respondent. He believes that five members of the Syindacato were killed by the government, because they refuse to investigate the deaths. Even if they

were killed by the guerillas, the government is unable to protect the respondent. Some of those threats are from the government since they came on government letterhead, even though unsigned. The final straw is, just before his left, he was advised by a high government official, and his friend, that the government intended to kill selected student leaders and that he might be on the list. He and four others fled the country. And, in fact, he read in Los Angeles or in California after his arrival that one of the student leaders who remained in that country, in fact, was killed.

The efforts by the guerrillas was not recruitment as such, certainly not for military service. Their invitation that he, and his organization, join them was based upon political opinion and activities, not an invitation to join them because he was an able-bodied young soldier. That does constitute persecution. In short, he does have a genuine, real, subjective fear of persecution, injury and death if returns to Guatemala. And that fear is supported by objective evidence of record. That fear is based upon political opinion and political activities as a student leader.

The Government would have the Court find that the respondent is a criminal and that is the root of his problems. There is no evidence of Government investigations, charges, or prosecution of this respondent for such acts. All the threats and acts by the government, and/or guerrillas, and/or right wing government support groups were based upon political grounds.

Nor does the Court find that the respondent is a terrorist. No one was ever hurt. His acts were politically motivated. Most of their activities consisted of property damage, which of course, is illegal, but that does not make the respondent a terrorist in this case. The Court would further note that Guatemala is a very violent country with a long history of cruelty, civil strife, and human rights violations by the government, by right wing government support groups, and by the guerrillas. His activities and those of his fellow students must be viewed in this perspective.

The Court would finally note that while his fear of returning to Guatemala because the guerrillas might harm him if they found he was a reserve military person, of course is not itself a grounds for granting political asylum. That would be an occupational hazard. However, the Court, has previously said, does find a genuine fear based upon objective evidence of persecution because of political opinion and activities as a student leader. And, accordingly, he is statutorily eligible for asylum.

Asylum, of course, is a discretionary grant. In viewing all of the activities, to include the criminal acts of property damage and vandalism and perhaps assault connected therewith, the Court does believe that those are outweighed by the favorable factors of record and accordingly will grant political asylum as a matter of discretion.

As to withholding of deportation, that is mandatory if the Court does find there a clear probability that he would be persecuted if returned to Guatemala; for the same reasons, his activities as a student leader for

political opinions, the Court will also grant withholding of deportation.

ORDER

IT IS HEREBY ORDERED that the application for political asylum is granted.

IT IS FURTHER ORDERED that the application for withholding of deportation is granted.

IT IS FURTHER ORDERED that these deportation proceedings are terminated.

/s/ JOHN W. RICHARDSON
JOHN W. RICHARDSON
Immigration Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-70267
I&NS No. A70-815-341

JUAN ANIBAL AGUIRRE-AGUIRRE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

[Filed: Nov. 26, 1997]

ORDER

Before: PREGERSON, NOONAN and KLEINFELD, Circuit Judges

The majority of the panel as constituted in the above case has voted to deny the petition for rehearing. Judge Kleinfeld voted to grant the petition for rehearing. Judge Pregerson voted to reject the suggestion for rehearing en banc. Judge Noonan recommended rejection.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

APPENDIX E

STATUTORY PROVISION INVOLVED

Section 243(h) of the Immigration and Nationality Act of 1952, as codified at 8 U.S.C. 1253(h) (1994), provides as follows:

Withholding of deportation or return

(1) The Attorney General shall not deport or return any alien (other than an alien described in section 1251(a)(4)(D) of this title) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

(2) Paragraph (1) shall not apply to any alien if the Attorney General determines that —

(A) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

(B) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

(C) there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States; or

(D) there are reasonable grounds for regarding the alien as a danger to the security of the United States.

For purposes of subparagraph (B), an alien who has been convicted of an aggravated felony shall be considered to have committed a particularly serious crime.

(2)

FILED
JUL 6 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 97-1754

In The

Supreme Court of the United States

October Term, 1997

IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

v.

JUAN ANIBAL AGUIRRE-AGUIRRE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

1. Whether this Court should grant this Petition for Writ of Certiorari when the facts underpinning the Board of Immigration Appeals' and the Court of Appeals' decisions are not the facts of this case.

2. Whether this Court should grant this Petition for Writ of Certiorari to consider an unremarkable exercise of judicial review, where there is no circuit conflict on the issue decided, and where the legal and factual issues are narrow and infrequently raised.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Juan Anibal Aguirre-Aguirre hereby opposes the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

STATEMENT

Central to the Immigration and Naturalization Service's (INS) Petition and the decision of the Board of Immigration Appeals (BIA) below was their belief that Mr. Aguirre committed serious crimes against civilians in Guatemala before fleeing to the United States. This contention is based on a transcript of the immigration judge (IJ) hearing in this case, held on April 5, 1995. Recently obtained information demonstrates that the transcript contains significant errors, and the INS, the BIA, and the Court of Appeals were mistaken about Mr. Aguirre's conduct in Guatemala. In short, this is not the same case the BIA and the Court of Appeals decided and this Court cannot grant certiorari under these circumstances.

At the hearing, Mr. Aguirre testified in Spanish; an interpreter interpreted questions and answers. As is typical in IJ proceedings, no court reporter was present. Rather, the proceedings were tape recorded. Later, a transcript was made of that tape recording and was used by the parties, by BIA, and by the Court of Appeals.

With the assistance of the Solicitor General's office, counsel for Mr. Aguirre herein recently obtained a copy of the official tape recording of the IJ hearing. A review of

the tape recording reveals both that the interpreter made mistakes in the interpretation of crucial aspects of the questions and answers at critical junctures, and that the transcriber committed at least one significant error, changing the meaning of crucial testimony.

The BIA, the Court of Appeals, and the INS all believed that Mr. Aguirre had said he stoned people, hit them with rocks. The dissent said "Hitting someone on the head with . . . a stone in the nature of a brick . . . " Pet. at 10a. But the hearing tape does not support this version of the facts.

Mr. Aguirre was asked on cross-examination by the INS trial attorney (TA): "And, were there any people on board these buses when you did this?" [when Mr. Aguirre and his compatriots burned the buses]. The interpreter correctly interpreted his answer, which was: "No, because we would stop the bus, help all the people, uh, get out of the bus, and then because there were so many, we would just stone them and make them get away and then burn the bus." AR 93.[1]

It is clear from the taped testimony that the stone-throwing was part of the process of clearing the buses of people so they would not be hurt when the buses were burned. In the immediate next question, the TA asked Mr. Aguirre whether anyone was hurt "during any of these bus burnings or stonings?" Mr. Aguirre said no. In subsequent questions, the TA asked specifically about the stoning of people, but very significantly, the interpreter

[1] AR refers to the administrative record before the Court of Appeals.

omitted those parts of the questions – perhaps because she knew Mr. Aguirre had not testified that he threw rocks at people, and in her mind, she was keeping the record straight.

Specifically, the TA asked: "When you were burning these buses and throwing rocks and things at people did you cover your face with a bandanna or in some other way hide your identity?" The interpreter omitted the phrase "throwing rocks and things at people." AR 94. Again, the TA asked, "The people who were in the stores, did you treat them in a similar fashion that you treated the people on the bus, that is throw rocks at them and hit them with sticks and tie them with ropes in order to get them to go?" AR 94. The interpreter omitted words, "throw rocks at them."

In sum, Mr. Aguirre was not told that the TA believed he had thrown rocks at people. The record reflects these questions, but no denials or clarifications by Mr. Aguirre. Mr. Aguirre's then-counsel did not clarify the matter either, apparently because he did not understand Spanish.

Mr. Aguirre explained that if the people on the bus would "heed" the protesters, they (the passengers) would leave the bus. AR 93. The interpreter interpreted correctly, but the transcript shows this: "But, if they be, I mean if they hit our, uh, bus then we get off the bus."

Other language problems color the transcript. Mr. Aguirre testified that if people did not leave the bus, the protesters would hit them with "sticks." AR 93. The word he used for "sticks" is "palos" which also may refer to a small tree branch, and which conveys a far different

concept than "baseball bat," the term used by the dissent in the Court of Appeals. Regarding the tying of the bus passengers, as part of his explanation, Mr. Aguirre said "asi," which essentially means, "like this." This indicates that Mr. Aguirre was demonstrating how he tied people, presumably by the wrists to lead them out of the bus, not lynch-mob style as the dissent below implies. The word "asi" and the explanation do not appear in the record. AR 93.

Mr. Aguirre testified that the protesters would break the windows of the stores and, using vernacular, he said "trash" them. The interpreter said "raid them. Taking everything they have."–AR 94. This was the interpreter's erroneous expansion, not Mr. Aguirre's testimony. Fortunately, in this instance the TA asked a follow-up question that was properly interpreted, so Mr. Aguirre clarified that the protesters would not steal anything but rather would leave the stores' contents on the floor. AR 94.

Mr. Aguirre was asked this question by the TA: "Do you think the government would be able to control those who are threatening you?" AR 92. The interpreter completely misinterpreted the question, asking Mr. Aguirre if he feared persecution by the government. No one realized the mistake and the matter never was clarified.

The BIA's decision, the Court of Appeals' dissent, and the INS's Petition all are grounded on their belief

that Mr. Aguirre committed serious crimes against civilians in Guatemala. The hearing tape demonstrates that the facts are not as everyone believed.[2]

REASONS FOR DENYING THE PETITION

As noted above, the Petition for Certiorari is based on an erroneous concept of the facts. The Petition also misconstrues what the Court of Appeals did below, misconstrues the magnitude of the issue, and claims there is a circuit split when there is not. A decision in this case would be largely advisory, having no application beyond the narrow confines of a seldom-invoked exception to a limited ground of relief from deportation. The number of cases and number of people even potentially affected by this court's decision would be minuscule, despite the INS's contentions to the contrary. Moreover, this Court's decision on the question raised would not dispose of the case, as there are independent grounds on which the Court of Appeals could reverse the BIA.

I. The Court of Appeals' Decision is An Unremarkable Example of Proper Judicial Review.

A. The petition construes this case as a purported example of the Court of Appeals' improperly usurping

[2] As Mr. Aguirre's counsel has informed counsel for the INS, she will obtain a full and accurate transcript of both Spanish and English testimony, using the services of a certified court interpreter, and will lodge the transcript with the Court and provide a copy to the INS.

the discretion of the Attorney General. In fact, the Court of Appeals applied the proper degree of deference, imposed the correct standard of review, and reached the correct result on the merits.

The Court of Appeals applied the proper standard of review in reviewing purely legal issues: de novo. The judiciary is the final authority on issues of statutory construction. *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, n. 9 (1984); *Demarest v. Manspeaker, et al.*, 498 U.S. 184, 190 (1991). No deference is afforded an agency's interpretation of strictly legal terms, with respect to which it has no particular expertise. *Batanic v. INS*, 12 F.3d 662, 665-666 (7th Cir. 1993); *Institute for Technology Development v. Brown*, 63 F.3d 445, 450 (5th Cir. 1995).

The Court of Appeals did not substitute its judgment for the BIA's. Rather, it faulted the BIA for the agency's failure in procedure, that is, failure to properly consider all the facts and circumstances of Mr. Aguirre's withholding application. Specifically, the Court said the BIA committed three errors of law in evaluating Mr. Aguirre's withholding application: 1) failing to consider Mr. Aguirre's offenses in relation to his declared political objectives. Pet. at 4a; 2) failing to consider and properly apply relevant Ninth Circuit law in determining whether Mr. Aguirre's acts were "political." Pet. at 6a; 3) failing to consider the persecution Mr. Aguirre might suffer if deported to Guatemala. Pet. at 6a.

The Court of Appeals below is by no means the only court to have reversed the BIA for failing to apply the correct standards or for failing to properly consider all

the facts and circumstances in an application for relief from deportation. *See Abdel-Masieh v. U.S. INS*, 73 F.3d 579 (5th Cir. 1996); *Diaz-Resendez v. INS*, 960 F.2d 493 (5th Cir. 1992); *Babai et al v. INS*, 985 F.2d 252 (6th Cir. 1993); *Akinyemi v. INS*, 969 F.2d 285 (7th Cir. 1992); *Guillen-Garcia v. INS*, 999 F.2d 199 (7th Cir. 1993); *Salameda v. INS*, 70 F.3d 447 (7th Cir. 1995); *Batanic v. INS*, 12 F.3d 662 (7th Cir. 1993); *Dulane v. INS*, 46 F.3d 988 (10th Cir. 1995); *Turri v. INS*, 997 F.2d 1306 (10th Cir. 1993). Many other cases have reversed the BIA for making errors of law, just as the Court did below. *See Goncalves v. INS*, 6 F.3d 830 (1st Cir. 1993); *Rosario v. INS*, 962 F.2d 220 (2d Cir. 1992); *Bedoya-Valencia v. INS*, 6 F.3d 891 (2d Cir. 1993); *White v. INS*, 75 F.3d 213 (5th Cir. 1996); *Castellon-Contreras v. INS*, 45 F.3d 149 (7th Cir. 1995); *Yeung v. INS*, 76 F.3d 337 (11th Cir. 1995).

The Court of Appeals in this case properly reversed the BIA, among other reasons, because in overturning the IJ's grant of withholding, the BIA failed to follow its own precedent. The BIA frequently has said that the IJ's credibility findings are entitled to "substantial deference." *Matter of Pula*, 19 I & N Dec. 467 (BIA 1987) and cases cited therein. The IJ's determinations must be given significant deference by reviewing courts and the BIA because the IJ is in the best position to observe the demeanor of the witness. *Matter of Kulle*, 19 I & N Dec. 318, 331 (BIA 1985); *Matter of Boromand*, 17 I & N Dec. 450, 452 (BIA 1980); *Matter of A___S___*, Int. Dec. 3336 (BIA 1998). Yet in this case, the BIA discarded the careful and considered judgment of the IJ.

Further, "the Attorney General" adopted opposing views in this case. Both the IJ and the BIA are delegatees

of the Attorney General.[3] This kind of internal conflict has led this Court to reject the INS's request for deference. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446, n. 30 (1987). Circuit Courts also may be less willing to defer to the decisions of the BIA when they reverse an IJ's grant of relief. *See*, for example, *Martinez-Benitez v. INS*, 956 F.2d 1053, 1056 (11th Cir. 1992) (BIA should have considered the IJ's findings and grant of relief in considering the proper weight to give the conviction).

The BIA also ignored its own precedent in deciding the merits of the case. The agency has acknowledged that violent actions may be the only option in countries where citizens have no opportunity to seek change in the political structure of the government through peaceful processes. *Matter of Izatula*, 20 I & N Dec. 149, 153-154 (BIA 1990), citing *Dwomoh v. Sava*, 696 F. Supp. 970, 979 (S.D.N.Y. 1988); *Matter of Rodriguez-Majano*, 19 I & N Dec. 811, 815 (BIA 1988) (activities directly related to a civil war, including the engaging in military actions, the burning of cars and the destruction of other property is not persecution of others). The BIA said:

> Were we to hold that practices such as attacking military bases, destroying property or [burning cars] constitute persecution [of others], members of armed opposition groups throughout the world would be barred from seeking haven in this country. . . . We do not believe Congress intended to restrict asylum and withholding only to those who had taken no part in armed conflict."

[3] *See* 8 C.F.R. § 1.1(l); 8 C.F.R. § 3.0(a).

Rodriguez-Majano, 19 I & N Dec. at 816. Contrary to the dissent's argument that, "The United States should be a haven for innocent people fleeing persecution," the BIA has conceded that withholding is not to be used as a reward for perfect behavior nor as a punishment for bad behavior.

Furthermore, reduced deference is appropriate where the agency has been inconsistent, as the INS has been in implementing the bar on serious non-political crimes. *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212-213 (1988). In 1988, the INS interpretation of the serious non-political crimes bar was entirely consistent with the Court of Appeals' decision below. Directing how these cases were to be handled, the INS said:

> [E]vidence of the commission of such non-political crimes will now be a discretionary factor to be considered together with the totality of circumstances and equities on a case-by-case basis consistent with the proper intent of the Refugee Act of 1980 as well as the 1951 U.N. Convention and 1967 Protocol Relating to the Status of Refugees.

53 Fed. Reg. 11300, 11301 (April 6, 1988).[4]

If the agency has reversed its position on the application of this bar, then the agency is not entitled to deference on this point. If, however, the agency's interpretation of this bar

[4] Referring to the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 (reprinted in 19 U.S.T. 6259) and the United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6223 (hereafter Protocol).

is still as it was in 1988, then the agency's interpretation is not at odds with the Court of Appeals.

The INS repeatedly cites the Attorney General's Opinion, *Deportation Proceedings for Joseph Patrick Thomas Doherty*, 13 Op. Off. Legal Counsel 1 (1989), rev'd, *Doherty v. INS*, 908 F.2d 1108 (2d Cir. 1990), rev'd, 502 U.S. 314 (1992). Pet. at 14, 19, 20, 22. That the INS attempts to cite this opinion as precedent highlights the odd position of the Attorney General in immigration matters: she is at once a party and the final administrative adjudicator.

Moreover, the INS concedes that the Attorney General's decision in *Doherty* was reversed by the Second Circuit, albeit on other grounds. *Doherty v. INS*, 908 F.2d at 1121-22. This Court reversed the decision of the Second Circuit, *INS v. Doherty*, 502 U.S. 314, but did not reach the issue cited by the INS in its certiorari petition. Thus, even if the original decision of the Attorney General had any precedential value, it surely retains none. That the INS resorted to repeatedly citing this 1989 Legal Opinion by the Attorney General demonstrates that there is little authority for its position.

B. The Court of Appeals was correct that the BIA misapplied rulings of this Court and the Circuit when it refused to follow the Handbook[5] and Protocol. This Court has directed that the definition of "refugee" is to be construed consistently with the U.N. Protocol. *INS v.*

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[5] Referring to the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol to the Status of Refugees*, (Jan. 1988), hereafter Handbook.

Stevic, 467 U.S. 407, 426, n.20 (1984). The Handbook "provides significant guidance in construing the Protocol, to which Congress sought to conform." *Cardoza-Fonseca*, 480 U.S. at 439, n. 22. The High Commissioner's analysis as expressed in the Handbook, this Court said, is consistent with its own. *Id.* Regarding the serious non-political crime exception, the Handbook says that:

> [I]t is also necessary to strike a balance between the nature of the offense presumed to have been committed by the applicant and the degree of persecution feared. If a person has a well-founded fear of very severe persecution, e.g., persecution endangering his life or freedom, a crime must be very grave in order to exclude him. If the persecution feared is less serious, it will be necessary to have regard to the nature of the crime or crimes presumed to have been committed in order to establish whether the applicant is not in reality a fugitive from justice or whether his criminal character does not outweigh his character as a *bona fide* refugee.

Handbook, paragraph 156, emphasis in original.

The Court of Appeals was correct to remand the case for the BIA to reconsider this case consistent with the Handbook and Protocol and with the BIA's own precedent.

II. The Serious Non-Political Crimes Bar to Withholding is Almost Never Invoked, and That Fact Will Not Change With the Recent Amendment of the INA.

A. The INS also misconstrued the magnitude of this issue. This Court's decision in this case would be largely advisory because this bar to withholding applies to so few people. Further, the legal issue here is narrow because the Court's ruling applies only to *this* bar to withholding, not to other bars nor to other forms of relief.

Within the narrow field of immigration law, there is the far narrower area known as relief from deportation. This area encompasses waivers and other remedies by which noncitizens seek to avoid being deported. Within this narrow area is the still narrower topic at issue in this case: withholding of deportation. Withholding of deportation is available to people who prove it is more likely than not that they will be persecuted if deported. *Stevic*, 467 U.S. at 429-30. Specifically, the INS is prohibited from deporting the person to a country where his or her life or freedom would be threatened on account of one of the five statutory grounds. *Id. and see* INA § 243(h), 8 U.S.C. § 1253(h).[6] A person granted withholding does not gain any immigration status as a result of having his or her deportation withheld.

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[6] Except as noted, all statutory references are to the statute as it existed prior to its amendment by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). For consistency, after the first reference, Respondent will refer to statutory sections with the INA section number rather than the United States Code section number.

Asylum is a different form of relief.[7] *See* INA § 208, 8 U.S.C. § 1158. In some aspects, proving eligibility for asylum is easier than proving eligibility for withholding. *See Cardoza-Fonseca*. Also, a person granted asylum can adjust his or her status to lawful permanent residence after one year. INA § 209, 8 U.S.C. § 1159. However, whether to grant asylum is a matter of discretion for the INS; withholding is mandatory. *Stevic*, 467 U.S. at 421-22, n. 15; *INS v. Doherty*, 502 U.S. 314, 332 (1992) (Scalia, concurring/dissenting) ("Because of the mandatory nature of the withholding-of-deportation provision, the Attorney General's power to deny withholding claims differs significantly from his broader authority to administer discretionary forms of relief such as asylum and suspension of deportation. Our decision in *INS v. Abudu*, 485 U.S. 94 (1988) reflects this.")

A withholding applicant must show a "clear probability" of persecution. *Cardoza-Fonseca*, 480 U.S. at 423; *Stevic*, 467 U.S. at 429-430. This is a high burden of proof. Narrowing the subset of withholding-eligible people even further are statutory and regulatory exceptions to the granting of withholding of deportation. One of the least invoked of those exceptions is at issue in this case: the bar to withholding for commission of "serious non-political crimes" found at § 243(h)(2)(C).

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[7] Although Mr. Aguirre applied for and was granted asylum, the BIA and the Court of Appeals focused on the withholding application, and the INS petitions for certiorari only on the withholding issue.

Few cases have even applied this exception to withholding of deportation, much less considered the balancing question at issue here. There are only five reported cases in which the BIA considered whether the "serious non-political crime" bar applied. *Matter of Rodriguez-Palma*, 17 I & N Dec. 465 (BIA 1980) (modified on other grounds, *Matter of Gonzalez*, 19 I & N Dec. 682 (BIA 1988)); *Matter of Ballester-Garcia*, 17 I & N Dec. 592 (BIA 1980) (modified on other grounds by *Gonzalez*); *Matter of Doural*, 18 I & N Dec. 37 (BIA 1981) (modified on other grounds by *Gonzalez*); *Matter of Ramirez-Rivero*, 18 I & N Dec. 135 (BIA 1981); *Matter of McMullen*, 19 I & N Dec. 90 (BIA 1984). In two other cases the BIA discussed the serious non-political crimes bar in dicta. *Matter of Rodriguez-Coto*, 19 I & N Dec. 208 (BIA 1985) (modified on other grounds by *Gonzalez*); *Matter of Frentescu*, 18 I & N Dec. 244 (BIA 1982) (modified on other grounds by *Gonzalez*).

Unlike this case, all these BIA cases concerned asylum *and* withholding. Almost all involved Cuban nationals who came to the United States after being released from Cuban prisons during the Mariel boatlift. The boatlift was a complex and unique situation, raising legal and political issues that were *sui generis*.

The Circuit Courts of Appeals have had even fewer occasions to rule on the "serious non-political crimes" bar. There is no circuit split; as discussed below, the case the INS cites as creating a circuit conflict, *Garcia-Mir v. Smith*, 766 F.2d 1478, 1487 n. 10 (11th Cir. 1985) *cert. denied sub nom. Marquez-Medina v. Meese*, 475 U.S. 1022 (1986) did not involve or decide this issue. Indeed, the case

below is the only federal court ruling squarely on this issue.

The dearth of cases applying the serious non-political crime bar is especially striking because from at least 1980 to 1990, the INS's own asylum regulations included precisely this same ground of disqualification. The regulation appeared first at 8 C.F.R. § 208.8(f)(1)(v), then at 208.13(c)(2) (proposed rule). *See also* 52 Fed. Reg. 32557 (Aug. 28, 1987); 53 Fed. Reg. 11301, 11306 (April 6, 1988); 55 Fed. Reg. 30674, 30683 (July 27, 1990). In 1988, the INS proposed deleting the serious non-political crimes bar from the regulations because the agency had "serious concerns with respect to the difficulties in determining the validity of allegations of 'serious non-political crimes.' " 53 Fed. Reg. 11300, 11301, 11306 (April 6, 1988). The bar was in fact deleted in 1990. 55 Fed. Reg. 30674, 30683 (July 27, 1990).

In an effort to make the "serious non-political crimes" bar appear more important than it is, the INS repeatedly cites to the 1996 IIRIRA amendment adding the "serious non-political crime" provision as a "new" ground of disqualification from asylum. The INS argues that this issue has "added importance now" because the § 243(h)(2)(C) withholding bar has been extended by IIRIRA § 604(a) to asylum cases.

Once again the INS's Petition misconstrues the situation. The IIRIRA amendment only codified the asylum regulation that had been in place for at least a decade. The regulation could scarcely have escaped the INS's notice: beginning in 1980 and continuing through 1998, occasional BIA and federal court cases – including cases

cited by the INS in its brief – cite this regulation. *See Garcia-Mir*, 766 F.2d at 1487 n. 10; *McMullen*, 19 I & N Dec. 90; *Matter of McMullen*, 17 I & N 542, 544, n. 2 (BIA 1980); *Saiyid v. INS*, 132 F.3d 1380 (11th Cir. 1998); *Azzouka v. Sava*, 777 F.2d 68, 73 (2d Cir. 1985); *Matter of Doural*, 18 I & N Dec. 37 (BIA 1981); *Matter of Ramirez-Rivero*, 18 I & N Dec. 135 (BIA 1981). In sum, although this bar was in the regulations for a decade, only a handful of cases had applied it to an asylum application, and most were *sui generis*. That the same bar is now in the asylum statute has not changed matters: the INS does not point to decisions of either the BIA or the Courts of Appeals applying this "new" IIRIRA asylum bar. The 1996 IIRIRA amendment has not resulted in a flood of cases presenting this issue, nor is it reasonable to expect such a flood.

B. The potential pool of cases presenting the "serious non-political crimes" bar to asylum or withholding is narrowed still further by the separate bar for persons convicted of an "aggravated felony" and particularly by the increasingly expansive definition of that term. *See Matter of S___S___*, Int. Dec. 3317 (BIA 1997); INA § 101(a)(43), 8 U.S.C. § 1101(a)(43); *Matter of C___*, 20 I & N Dec. 529 (BIA 1992); *Choeum v. INS*, 129 F.3d 29, 42 (1st Cir. 1997). Since 1990, a person convicted of an aggravated felony has been statutorily ineligible for asylum, even if he or she were convicted outside the United States. INA § 208(d), as added by § 515(a)(10) of the Immigration Act of 1990; § 101(a)(43). The current (post IIRIRA) asylum bar for people convicted of aggravated felonies is at INA § 208(b)(2)(B)(i).

Before 1996, a person convicted of an aggravated felony was deemed to be convicted of a particularly serious crime, precluding a grant of withholding. INA § 243(h)(2)(B). *But see*, Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) § 413(f), *Matter of Q___T___M___T___*, Int. Dec. 3300 (BIA 1996). Under current law, people convicted of aggravated felonies who were sentenced to at least five years imprisonment are considered to have been convicted of a particularly serious crime, making them ineligible for withholding. Current INA § 241(b)(3)(B)(ii), 8 U.S.C. § 1231(b)(3)(B)(ii).

The definition of "aggravated felony" has been expanded steadily since it was first applied in the immigration context in 1988. It was expanded again in IIRIRA, so that many crimes that were not previously aggravated felonies may now be so classified. *See* IIRIRA § 321(b). *Matter of Yeung*, Int. Dec. 3297 (BIA 1996). Convictions that might otherwise be considered to be serious non-political crimes committed outside the United States would be classified as aggravated felonies, and asylum and withholding would be barred without resort to the serious non-political crimes bar.

In fact, with the possible exception of *McMullen*, in *all* the BIA cases presenting the serious non-political crimes bar, the applicant had been convicted of a crime that presumably now would be held to be an aggravated felony. In practice, those few cases that applied this bar in prior decisions would not even reach the BIA now. Typically, the IJ would pretermit the withholding and asylum applications based on the easily applied aggravated felony bar without reaching the serious non-political crimes bar. *See Matter of C___*, 20 I & N Dec. 529 (BIA 1992).

C. This case is factually and legally insignificant also because a decision here would resolve this issue only in the withholding context, not in the asylum context. If, *arguendo*, the INS is correct that in the future the serious non-political crimes bar will arise more frequently because the bar now is in the asylum statute, then the Court can and should await a case presenting the balancing issue in an asylum case. Any ruling on the bar in the withholding context would not necessarily apply in the asylum context. As this Court does not render advisory opinions or resolve questions not before it, the Court's resources would be better reserved to resolve this issue, if need be, in a case concerning both asylum and withholding.

D. In addition, the Court of Appeals' decision applies only to this particular bar to withholding of deportation, § 243(h)(2)(C). It does not apply to the other, more commonly applied bars, including the "particularly serious crime," § 243(h)(2)(B), or "persecutor of others," § 243(h)(2)(A).

Regarding the former, the Ninth Circuit already has held that no balancing applies to the "particularly serious crime" bar. *Ramirez-Ramos v. INS*, 814 F.2d 1394, 1397-98 (9th Cir. 1987). *See also Komarenko v. INS*, 35 F.3d 432, 436 (9th Cir. 1994), citing *Urbina-Mauricio v. INS*, 989 F.2d 1085, 1088 (9th Cir. 1993). In *Ramirez-Ramos* the Court distinguished the "particularly serious crimes" bar of § 243(h)(2)(B) from the "serious non-political crimes" bar of § 243(h)(2)(C). It implied – but did not hold – that in applying the "serious non-political crimes" bar the adjudicator should balance the risk of persecution against the

crime committed outside the United States. It is instructive that the Ninth Circuit did not revisit the § 243(h)(2)(C) balancing question in the decade following the *Ramirez-Ramos* decision.

The INS argues that the Court of Appeals' decision in this case is inconsistent with the same Circuit's decision in *Ramirez-Ramos*. However, the two cases pertain to two different bars to withholding. *Ramirez-Ramos* anticipated the *Aguirre* holding by distinguishing the particularly serious crime bar from the serious non-political crime bar.

Moreover, even if, arguendo, the two decisions are inconsistent, that is not cause to grant certiorari in this case. This Court does not sit to make one circuit's law internally consistent. The *Aguirre* decision did not discuss or distinguish *Ramirez-Ramos*; in the unlikely event there is a future case pertaining to this bar, if the Court of Appeals should believe the two cases are inconsistent, it can remedy the inconsistency, either in a panel decision or in an *en banc* decision.

III. The Court of Appeals' Decision Does Not Create a Circuit Conflict.

Not surprisingly, considering the insignificance of this issue and the paucity of cases on this topic, there is no conflict among the Circuit Courts of Appeals. The sole case the INS points to as the "circuit conflict" is *Garcia-Mir v. Smith*, 766 F.2d 1478 (11th Cir. 1985), *cert. denied sub nom. Marquez-Medina v. Meese*, 475 U.S. 1022 (1986). Tellingly, the INS does not attempt to argue that the case itself actually pertains to this issue.

In *Garcia-Mir*, the Eleventh Circuit did not squarely hold that the Attorney General may not consider the degree of possible persecution and the seriousn ss of the crime committed. Rather, the "conflict" the INS cites was dictum in a footnote regarding a tangential issue, buried deep in a complex, multi-layered decision about Mariel Cubans, exhaustion of administrative remedies, and jurisdiction of the district court in exclusion cases. *Id.* at 1487, n. 10.

The issues in *Garcia-Mir* were: 1) whether the district court exceeded its authority in ordering the government to resume its procedures for releasing Mariel boatlift Cubans; and 2) whether the district court erred in ordering the BIA to reopen two class members' exclusion hearings and in extending that order to all class members. The case did not address nor hold anything on the substance or merits of the serious non-political crimes bar. The footnote the INS cites as creating the circuit conflict is in the section of the case addressing whether the district court had properly ordered the BIA to reopen the class members' cases. The court agreed with the INS that the BIA's disposition of the two class members' cases did not satisfy the jurisdictional exhaustion requirements for the rest of the class. The footnote concerned both withholding and asylum, further distinguishing it from this case.

Significantly, a decision issued three years after *Garcia-Mir* reversed the BIA for *failing* to weigh the applicant's crime against the favorable evidence. In *Arauz v. Rivkind*, 845 F.2d 271 (11th Cir. 1988), the applicant had been convicted of a drug trafficking crime. The IJ and BIA held he was statutorily ineligible for withholding and refused to consider his asylum application. *Id.*, at 274.

The Court reversed, holding that, although the narcotics offense was "an adverse factor which [sic] would militate heavily against him in the review of his asylum application," the conviction was "not the only evidence to be considered by the [IJ]." *Id.* at 276. The applicant must be afforded a meaningful opportunity to be heard, followed by the IJ's "careful consideration of the *weight to be given such evidence.*" *Id.*, emphasis added.

The Eleventh Circuit has not addressed this issue again since 1988 and no other Circuit Court has decided the matter. There is no Circuit conflict. Certiorari is not appropriate.

IV. There Were Independent Grounds For The Court of Appeals' Decision.

Granting certiorari is not appropriate here because there were independent grounds for the Court of Appeals to reverse the BIA's decision, that is, grounds not addressed by the Court of Appeals. Because the Court of Appeals did not reach these issues, and because the remand to the agency would be correct for any one of these alternative reasons, this Court's decision will not end this case.

A. Remand pursuant to AEDPA § 413(f)

Mr. Aguirre argued below that the case should be remanded because Congress had recently amended the INA to permit a grant of withholding of deportation even where the applicant had committed a serious non-political crime outside the United States. § 413(f) of the

AEDPA, amending INA § 243(h). *See Choeum*, 129 F.3d at 41-43; *Matter of Q___T___M___T___*, Int. Dec. 3300 (BIA 1996). The government responded below that the amendment did not apply to Mr. Aguirre because his case was "final" before the amendment took effect, citing § 413(g) of the AEDPA.

The Court of Appeals skirted the issue, saying that the Court already was bound to apply the standards of the Protocol, pursuant to *McMullen*. Pet. at 4a. Instead, the Court properly could have found that the amendment applied to Mr. Aguirre and then could have remanded to the BIA for it to consider the amendment's affect on this case. Or, the Court properly could have remanded for the BIA to determine if the amendment applied to Mr. Aguirre and if so, how it would affect this case. The Court could have remanded on the basis of the AEDPA amendment without reaching any of the issues discussed in the INS's Petition for Certiorari.

B. "Serious Reasons to Consider"

The Court of Appeals also could have reversed the BIA's decision because the BIA failed to properly and adequately evaluate whether the "serious reasons to consider" prong of § 243(h)(2)(C) was met. To meet this prong, there must be convincing and reliable evidence that serious non-political crimes were committed and that they were committed by the applicant. *See McMullen v. INS*, 788 F.2d 591, 598-99 (9th Cir. 1986). As the INS itself conceded in 1988, when it proposed deleting this bar from its regulations, determining the validity of charges

of "serious non-political crimes" is very difficult.[8] *See, e.g., Matter of Doural*, 18 I & N Dec. 37, 38-39 (BIA 1981); *Matter of Ramirez-Rivero*, 18 I & N Dec. 135, 139 (BIA 1981).

The BIA glossed over this prong in Mr. Aguirre's case. This was reversible error as well. The IJ observed that Mr. Aguirre had not been investigated, charged or prosecuted for any crime by the police in Guatemala. Pet. at 30a. The only evidence of any criminal conduct was from the transcript of Mr. Aguirre's testimony. The Court of Appeals could have remanded on this basis as well, directing the BIA to properly evaluate whether this prong was met.

C. The BIA's First and Second Errors of Law

The INS's chief complaint with the Court of Appeals' decision – that the Court required the BIA to balance the persecution Mr. Aguirre will face against his criminal conduct – was the Court's third and last reason for reversing the BIA. Pet. at 6a. The Court did not reverse solely or even primarily on this basis.

The first error of law the Court found was that the BIA did not consider Mr. Aguirre's offenses in relation to his declared political objectives. Pet. at 4a. The second error of law was that the BIA failed to consider and properly apply relevant Ninth Circuit law in determining whether Mr. Aguirre's acts were "political." Pet. at 6a. Either of these other errors of law is a proper and sufficient basis for reversing the BIA's decision. This Court's

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[8] 53 Fed. Reg. 11300, 11301, 11306 (April 6, 1988).

holding regarding the balancing of persecution versus crime will not dispose of these other issues.

CONCLUSION

Because the facts are not as the BIA and the Court of Appeals believed, this Court should not grant the writ of certiorari. Further, the case was properly and correctly decided by the Court of Appeals.

The petition should be denied. Alternatively, in light of the deficient record, Respondent respectfully requests this Court to vacate the BIA's opinion and remand to the agency with instructions to take new evidence and rehear Mr. Aguirre's applications for withholding and asylum.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

JUAN ANIBAL AGUIRRE-AGUIRRE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

1. Respondent contends that the certiorari petition "is based on an erroneous concept of the facts" (Br. in Opp. 5) because "[r]ecently obtained information" (*id.* at 1) indicates that there are errors in the certified transcript of the administrative hearing. This claim comes too late. Respondent never challenged the accuracy of the transcript before the Board of Immigration Appeals (BIA); in fact he filed no brief at all before the BIA (see Pet. 6 n.3). He did file a brief in the court of appeals, but again never challenged the accuracy of the transcript. There is, moreover, no excuse for his failure to do so. Although he may have only "[r]ecently obtained" the tape recording of the administrative hearing, it has been available to him all along.[1]

[1] We have been informed by the Executive Office for Immigration Review (EOIR) that counsel, with the permission of the client, may, at any time, make a request to EOIR under the Freedom of Information Act, 5 U.S.C. 552, to obtain the full record, including copies of the tape recording.

It is clear that respondent's counsel in the court of appeals, (Resp. C.A. Br. 31) both of whom continue to represent him in this Court,

In any event, respondent's reliance on asserted errors in the transcript is without merit. Respondent's central claim is that the transcript states that he stoned civilian bus passengers, but that, in fact, respondent stated that he stoned the buses not the people. See Br. in Opp. 2-3. The tape recording of the hearing does not support that claim. Respondent used a feminine direct object pronoun ("la" translated as "the," see Adm. Rec. 93; see Anthony Gooch & Angel García de Paredes, *Cassell's Spanish-English, English-Spanish Dictionary* 385 (1978)) to refer to the object of his stoning, thus referring back to his use of "la gente" (translated as "the people," Adm. Rec. 93), which is feminine (see *Cassell's*, *supra*, at 332), and not to "el bus" (translated as "the bus," Adm. Rec. 93) which is masculine (see *Cassell's*, *supra*, at 80 (autobus)). If respondent had intended to refer to "el bus," he would have used the masculine direct object pronoun "lo" (see *id.* at 396). Moreover, even under respondent's new factual scenario, "stonethrowing was part of the process of clearing the buses of people" (Br. in Opp. 2), violent conduct that undoubtedly would have terrified the passengers and risked serious injury to them.

None of the other asserted errors respondent discusses is material at this juncture, and none alters the fact that it is undisputed that, on several occasions, over the course of approximately three years (Adm. Rec. 92), respondent hit innocent civilian bus passengers with "palos" (Br. in Opp.

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reviewed the transcript of the hearing. In their brief in the court of appeals, counsel repeatedly cited the hearing transcript (see *id.* at 4-13 (citing it as ROP [record of proceeding] 57-106)), without challenging its accuracy. Indeed, they acknowledged that respondent and the others in the student organization had harmed civilian bus riders and store owners. *Id.* at 26. They attempted to minimize the violent acts by contending that the harm inflicted on innocent civilians "was a result of resistance by people not in agreement with the [student organization's] goals or methods." *Id.* at 24, 26.

3), tied them up with rope (*id.* at 4), broke windows of stores, and ransacked the store owners' merchandise. See Pet. App. 8a-10a. Even if respondent's quibbles with the transcript on several of the particulars were well taken, which they are not,[2] the nature of the weapon used to beat the bus passengers and the method of tying them up does nothing to detract from the fundamental soundness of the BIA's conclusion that there were "serious reasons for considering" that respondent had committed serious non-political crimes in Guatemala. *Id.* at 17a-18a. Although respondent and the other students were purportedly protesting against the government because of the increase in student bus fares and inaction in investigating student deaths, their violent acts were directed not against the government, but against innocent civilians and private property.[3]

2. a. Respondent makes no effort to answer our contention (Pet. 15-16) that the Ninth Circuit erred in holding

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[2] There is no merit to respondent's attempt to minimize the seriousness of the assaults on the civilians by suggesting that the "palos" he used "may refer to a small tree branch" (Br. in Opp. 3-4) or that he tied the people with ropes at the wrists instead of in some other fashion (*id.* at 4). Respondent's new characterization is pure speculation: "palos" generally means sticks or poles (see *Cassell's*, *supra*, at 452); respondent did not use the word for branch ("rama," *id.* at 498); respondent did not even use the word for small sticks ("palitos," *id.* at 452); the verb used by respondent, "golpear," was translated as "hit" but also could be translated to mean "beat, strike, hit, knock, hammer, pound, pummel" (*id.* at 335), which suggests the use of something more than a small branch. And the record simply does not include any description of the method of tying up the civilians.

[3] For the Court's convenience, we are lodging with the Clerk a copy of the tape recording of the administrative hearing which we obtained from EOIR and provided to respondent's counsel. We also are lodging a copy of the certified record of administrative proceedings, filed in the court of appeals, which contains (at 57-106) the certified transcript of the hearing.

that under 8 U.S.C. 1253(h)(2)(C) (1994) and related provisions, the Attorney General must balance the seriousness of the crime she has reason to believe an alien committed against the seriousness of the persecution he might face upon return. The Ninth Circuit's holding finds no support in the text of the statute and is contrary to the Attorney General's longstanding interpretation, which is entitled to deference. See Pet. 13-16.

Moreover, despite respondent's assertions to the contrary (Br. in Opp. 14-15, 19-21), the court of appeals' ruling on this point squarely conflicts with the Eleventh Circuit's decision in *Garcia-Mir* v. *Smith*, 766 F.2d 1478 (1985) (per curiam), cert. denied *sub nom. Marquez-Medina* v. *Meese*, 475 U.S. 1022 (1986). The *Garcia-Mir* court unequivocally held that the aliens in that case were "mistaken" in believing that, with regard to withholding applications, the INS "must balance the degree of persecution which an alien will face if deported against the seriousness of the alien's past criminal activity." 766 F.2d at 1487 n.10. That statement was not dictum. It was the basis for the court's rejection of the aliens' contention that the lower court's decision staying the exclusion orders of even those individuals who would be ineligible for withholding was proper, as well as its holding that "[i]neligible [aliens'] motions to reopen may properly be denied without expenditure of further administrative or judicial resources." *Ibid.* The circuit conflict on that issue warrants resolution by the Court.

Respondent's reliance (Br. in Opp. 20-21) on *Arauz* v. *Rivkind*, 845 F.2d 271 (11th Cir. 1988), to suggest that the Eleventh Circuit addressed the same withholding bar a few years after *Garcia-Mir* and altered its view of that bar is quite misleading. In *Arauz*, the Eleventh Circuit *sustained* the BIA's denial of withholding of deportation based on a different statutory bar, because the alien,

having committed "a particularly serious crime," was a "danger to the community of the United States." See 8 U.S.C. 1253(h)(2)(B) (1994); 8 U.S.C. 1231(b)(3)(B)(ii) (Supp. II 1996). Moreover, the Eleventh Circuit rejected a claim similar to respondent's argument for balancing here, holding that since the alien's "narcotics conviction was in the record, the immigration judge did not have to consider additional information concerning [the alien's] request for withholding of deportation, *because no amount of evidence would have negated the fact of [his] statutory ineligibility for withholding of deportation*." *Arauz*, 845 F.2d at 275 (emphasis added).[4] The language in the opinion quoted by respondent (Br. in Opp. 21) related only to asylum, not to withholding of deportation or a statutory bar to that relief.

b. Respondent likewise makes no effort to answer our argument (Pet. 18-22) that the Ninth Circuit erred in rejecting the Attorney General's interpretation of 8 U.S.C. 1253(h)(2)(C) (1994) in other fundamental respects as well. The Ninth Circuit's recasting of the "serious nonpolitical crime" also warrants review by this Court because it excuses violent acts against innocent civilians and their property that are wholly out of proportion to respondent's

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[4] As we note in the petition (at 17-18 n.6), the court of appeals' holding in the instant case is inconsistent with the recognition in a number of circuits that the other bars to withholding set forth in the neighboring subsections of 8 U.S.C. 1253(h)(2) (1994) (now 8 U.S.C. 1231(b)(3)(B) (Supp. II 1996)) are mandatory and do not require any balancing against the severity of potential persecution. Respondent recognizes that conflict (Br. in Opp. 18-19), but suggests, without any reasoned analysis, that the result should be different under Section 1253(h)(2)(C) than, for example, under Section 1253(h)(2)(B). Resolution of the circuit conflict specifically with respect to Section 1253(h)(2)(C) therefore may clarify the broader issue of the proper standard for the neighboring statutory bars as well.

supposed political disagreement with the Guatemalan government. See Pet. 20-21, 23.

3. As we previously discussed (Pet. 12-14), a high degree of deference is owed to the Attorney General's interpretation and application of the applicable statutory provision under *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 448 (1987). Respondent nonetheless contends (Br. in Opp. 7-8) that, because the BIA reversed the ruling of the immigration judge (IJ), the BIA's determination is entitled to reduced deference. The court of appeals opinion relied upon by respondent (*ibid.*) confirms, however, that where, as here, the BIA reversed an IJ's decision in the same case, the "reviewing court is not free to choose between the two interpretations, but must defer to the Board if its decision is supported by substantial evidence." See *Martinez-Benitez* v. *INS*, 956 F.2d 1053, 1055 (11th Cir. 1992).[5] By contrast, when this Court declined to accord heightened deference to an administrative position in *Cardoza-Fonseca*, 480 U.S. at 446 n.30, it was because the BIA itself had taken inconsistent positions in different cases. There is no such inconsistency in BIA decisions here.[6]

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[5] Respondent also errs in contending (Br. in Opp. 7) that the BIA failed to follow its own precedents that call for deference to an IJ's credibility findings. The BIA's decision was not based on any disagreement with the IJ over the credibility of any witnesses. See Resp. C.A. Br. 15 (noting that BIA did not reject IJ's credibility determination).

[6] Neither of the prior BIA decisions cited by respondent (Br. in Opp. 8), involved the statutory bar at issue here. *In re Rodriguez-Majano*, 19 I. & N. Dec. 811 (BIA 1988), involved the question whether an alien had engaged in the persecution of others, which triggers a different bar to asylum and withholding of deportation under 8 U.S.C. 1101(a)(42)(A), 1158(a), 1253(h)(2)(A) (1994), and 8 U.S.C. 1158(b)(2)(A)(i), 1231(b)(3)(B)(i) (Supp. II 1996). *In re Izatula*, 20 I. & N. Dec. 149 (BIA 1990), involved the question, not presented here, whether the alien had shown the requisite likelihood (or fear of) persecution to warrant relief, or whether he instead risked only legitimate prosecution by an internationally-recognized government for crimes he had committed. Neither decision involved the question of balancing a statutory withholding bar against the seriousness of the possible persecution upon return.

Respondent also contends (Br. in Opp. 9-10) that "reduced deference" is appropriate here because, according to respondent, the INS has been inconsistent in interpreting the "serious nonpolitical crimes" bar. But the 1988 INS interpretation quoted by respondent did not relate to the statutory bar to withholding of deportation. Rather, it referred to the elimination of a proposed rule that would have mandated the denial of *asylum*. See 53 Fed. Reg. 11,301-11,302. Indeed, respondent's quotation begins in the middle of a sentence, the beginning of which specified that the statement was made "in the asylum context," and the immediately preceding sentence stated: "The parallel provision contained in § 208.16(c)(2)(iii) with respect to mandatory denials of withholding of deportation will remain intact because it is required by statute." 53 Fed. Reg. at 11,302. Thus, it could not be clearer that the reference to a "discretionary factor" quoted by respondent (Br. in Opp. 9), related to asylum, not to withholding of deportation, and that the Attorney General's interpretation of the withholding bar as mandatory under the INA has been consistent.[7]

4. Respondent's attempts (Br. in Opp. 12-19) to minimize the impact of the court of appeals' decision are without merit. Respondent asserts (*id.* at 14) that all the BIA cases addressing the statutory bar at issue here are

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[7] Respondent's reliance (Br. in Opp. 10-11) on the *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (Jan. 1988) is misplaced, for the reasons stated in the petition (at 16-17), to which respondent offers no response.

unlike this case because they "concerned asylum *and* withholding," but he does not explain why that matters. In any event, as we explain in the certiorari petition (at 24 n.8), reversal by this Court of the judgment below on the withholding issue would also require reversal of the court of appeals' ruling on asylum, because the sole basis for the court's remand of the asylum issue to the BIA was the court's conclusion that the BIA had erred in its withholding analysis. See Pet. App. 7a.

Moreover, as we also explain in the petition (at 23), the significance of the Ninth Circuit's legal errors will increase in the future because the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 604(a), 110 Stat. 3009-691, now extends the same statutory bar to asylum cases. See 8 U.S.C. 1158(b)(2)(A)(iii) (Supp. II 1996). Respondent is wrong in asserting (Br. in Opp. 15) that IIRIRA has worked no expansion in this regard because it simply "codifie[d] the asylum regulation that had been in place for at least a decade." The first regulation cited by respondent, 8 C.F.R. 208.8(f)(1)(v), was promulgated as an interim regulation in 1980, 45 Fed. Reg. 37,392, but it applied only to decisions by district directors, not to decisions by IJs and the BIA. See 8 C.F.R. 208.8, 208.10 (1981); see also *Arauz* v. *Rivkind*, 845 F.2d at 275-276; *In re Gonzalez*, 19 I & N. Dec. 682 (BIA 1988) (modifying earlier view and holding that IJs and BIA are not bound by 8 C.F.R. 208.8(f)(1) (1988)). The second provision cited by respondent, see 52 Fed. Reg. 32,557 (1987), was a proposed rule that never took effect and that, in any event, would have applied a "serious nonpolitical crime" bar only to decisions by asylum officers. The third provision cited by respondent, 53 Fed. Reg. 11,306 (1988), eliminated the previously proposed "serious nonpolitical crime" bar to asylum. See 8 C.F.R. 208.14 (1998). Thus, prior to

IIRIRA, there was *not* a mandatory bar to asylum in deportation or exclusion proceedings based on reasons to believe that the alien had committed a serious nonpolitical crime.

Respondent similarly errs in suggesting (Br. in Opp. 16-17) that the Ninth Circuit's legal rulings are not significant because the separate bar to asylum or withholding of deportation for aliens who have been convicted of a particularly serious crime[8] will apply to essentially the same pool of aliens who are covered by the statutory provision involved in this case. Unlike the particularly serious crime bar, the provision at issue here does not require proof of a conviction; it requires only "serious reasons for considering" that the alien committed a serious nonpolitical crime outside the United States. 8 U.S.C. 1253(h)(2)(C) (1994); accord 8 U.S.C. 1158(b)(2)(A)(iii), 1231(b)(3)(B)(iii) (Supp. II 1996). Moreover, respondent's approach would lead to the anomalous result that those aliens who are successful in avoiding prosecution in the country where they committed a serious nonpolitical crime would be entitled to greater protection than would those who had been prosecuted and punished for their crimes.

5. Contrary to respondent's assertion (Br. in Opp. 21-24), the court of appeals' ruling is not supported by "independent grounds." The provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, on which respondent relies (Br. in Opp. 21-22), do not apply because the BIA had taken final action on respondent's application for relief before the

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[8] See 8 U.S.C. 1158(d), 1253(h)(2)(B) and final paragraph (1994); 8 U.S.C. 1158(b)(2)(A)(ii) and (B)(i), 1231(b)(3)(B)(ii) and final paragraph (Supp. II 1996). As specified in those provisions, a particularly serious crime includes some or all aggravated felonies, as defined in 8 U.S.C. 1101(a)(43) (1994 & Supp. II 1996).

April 24, 1996, effective date of AEDPA. See Pet. 3-4 n.2. Respondent's criticism (Br. in Opp. 22-23) of the BIA for assertedly glossing over the prong of 8 U.S.C. 1253(h)(2)(C) (1994) that requires the Attorney General to have "serious reasons for considering" that he committed a serious nonpolitical crime is baseless. He did not raise that argument in the court of appeals, and he cites no evidence to contradict his own testimony about his conduct in Guatemala, on which the administrative decision-makers and courts have all relied.

Finally, respondent's reliance (Br. in Opp. 23-24) on the other two legal errors found by the court of appeals does not support a denial of review in this case. To the contrary, as we demonstrate in the certiorari petition (at 18-22), the court of appeals' decision should be reversed in those other respects as well, because the BIA properly concluded that respondent's actions of violence against innocent civilians were wholly disproportionate to his asserted political objectives.

* * * * *

For the foregoing reasons, and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

SETH P. WAXMAN
Solicitor General

JULY 1998

Supreme Court, U.S.
FILED
DEC 4 1998

(5)

No. 97-1754

In the Supreme Court of the United States

OCTOBER TERM, 1998

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

JUAN ANIBAL AGUIRRE-AGUIRRE, RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED: APRIL 27, 1998
CERTIORARI GRANTED: OCTOBER 5, 1998

62 pp

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket No. 96-70267

AGUIRRE-AGUIRRE, ET AL

v.

IMMIGRATION AND NATURALIZATION SERVICE

DOCKET ENTRIES

DATE	PROCEEDINGS
1996	
4/10	FILED PETITION FOR REVIEW; DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL; NOTIFIED RESPONDENTS OF FILING. setting schedule as follows: petitioner's opening brief is due 7/8/96; respondent's brief is due 8/7/96; petitioner's optional reply brief is due 8/21/96. (PRO SE) [96-70267] (terr)
5/28	FILED CERTIFIED TRANS OF ADMINISTRATIVE RECORD ON APPEAL IN ONE VOLUME OF PLDGS, 4 CERT COPIES. [96-70267] [96-70267] (ogm)

DATE	PROCEEDINGS
1997	
5/7	ARGUED AND SUBMITTED TO Harry PREGERSON, John T. NOONAN, Andrew J. KLEINFELD [96-70267] (mlm)
8/8	FILED OPINION: PETITION GRANTED AND REMANDED (Terminated on the Merits after Oral Hearing; Remanded; Written, Signed, Published. Harry PREGERSON; John T. NOONAN, author; Andrew J. KLEINFELD, dissenting.) FILED AND ENTERED JUDGMENT. [96-70267] 9/29/97 (dl)
9/22	[3308166] Filed original and 40 copies Respondent INS petition for rehearing with suggestion for rehearing en banc (PANEL AND ALL ACTIVE JUDGES) 14 p.pages, served on 9/19 [96-70267] (ckp)
11/26	Filed order (Harry PREGERSON, John T. NOONAN, Andrew J. KLEINFELD): The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected. [3308166-1] [96-70276] (dl)
2/24	MANDATE ISSUED [96-70267] (ckp)
5/4	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 97-1754 filed on 27 April 1998. [96-70267] (dl)

[58][*]

U.S. Department of Justice
Executive Office for Immigration Review
Office of the Immigration Judge

File A70815341

IN DEPORTATION PROCEEDINGS
Transcript of Hearing

Matter of

Juan Anibal Aguirre Aguirre,
Respondent

Before: JOHN T. ZASTROW, Immigration Judge

Date: September 22, 1994 Place: Phoenix, Arizona

Transcribed by DEPOSITION SERVICES, INC.
at Rockville, Maryland

Official Interpreter: Louise Ballasco

Language: Spanish

Appearances:

For the Immigration and Naturalization Service:	For the Respondent:
John R. Holya, Esquire (Trial Attorney)	Pro se

[*] The bracketed page numbers refer to the pages in the Administrative Record where the relevant transcript portion appears. The Administrative Record was lodged with the Court in conjunction with the filing of the government's reply brief at the petition stage.

[59]

JUDGE FOR THE RECORD

This is Immigration Judge John T. Zastro telephonic proceedings in Phoenix, Arizona, date is September 22, 1994. The matter is Juan Anibal Aguirre Aguirre, A 70 815 341. General attorney is John R. Holya, Esquire and official interpreter is Louise Ballasco (phonetic sp.), both in Phoenix with me.

JUDGE TO MR. AGUIRRE

Q. Sir, are you Juan Aguirre?

A. Yes.

Q. Mr. Aguirre, this is your first time here. Would you like to have a continuance and have some time to try to find an attorney?

A. I got a group here. I've got a lot of group here, can I show you the group?

Q. Well, I can't see it.

MR. HOLYA TO JUDGE

Q. He filed the asylum, he should get an attorney.

A. Okay.

JUDGE TO MR. AGUIRRE

Q. It's my understanding, the Government's attorney is here with me in Phoenix, and I understand, he tells me you filed for asylum, so you probably should look for a lawyer. For instance there is Catholic Social Services up there plus other private attorneys. So, why don't you to take a continuance and get an attorney?

[60]

A. I came here and requested an exemption and I got one for six months.

Q. Well, I want you take some time and get an attorney. I'm going to set this case for 8:30 on November 21st. Look for an attorney. All right, now I've got to read you something. You've been scheduled for deportation hearing November 21 at 8:30 up in Las Vegas. If you don't appear at that time you will be found ineligible for voluntary departure, suspension of deportation,

INTERPRETER TO JUDGE

Q. Pardon?

A. Suspension of deportation.

JUDGE TO MR. ARGUIRRE

Q. Or adjustment of status for a period of five years. Now, there's one more thing I want to verify with you. Do you live at 1400 East Mcdonald Avenue, Apartment B in North Las Vegas?

A. It's apartment 8. What about the six month permit I got?

MR. HOLYA TO JUDGE

Q. I think that's a work permit, Your Honor.

JUDGE TO MR. AGUIRRE

Q. That's a work permit. You have to talk to the people at Immigration to get them to extend it.

A. I got it for—they already gave it to me. I [61] requested it for six months and I got it. I can pick that up on Monday.

Q. Okay, well, then go to work.

A. I am working.

Q. Okay. All right, we'll see you back in November 21st at 8:30. Try to find a lawyer.

A. Okay.

HEARING CONTINUED

[62]

U.S. Department of Justice
Executive Office for Immigration Review
Office of the Immigration Judge

File A70815341

IN DEPORTATION PROCEEDINGS
Transcript of Hearing

Matter of

JUAN ANIBAL AGUIRRE AGUIRRE,
Respondent

Before: JOHN W. RICHARDSON, Immigration Judge

Date: November 21, 1994 Place: Phoenix, Arizona

Transcribed by DEPOSITION SERVICES, INC.
at Rockville, Maryland

Official Interpreter: Sari Torritzki

Language: Spanish

Appearances:

For the Immigration and Naturalization Service:	For the Respondent:
Jack Bartlett, Esquire (Trial Attorney)	Joseph W. Long, Esquire

[63]

JUDGE FOR THE RECORD

This is Immigration Judge John Richardson sitting at a deportation proceeding on the 21st day of November, 1994. I'm at the U.S. Courthouse in Phoenix, Arizona as is Mr. Jack Bartlett, General Attorney with the Immigration Service here in Phoenix.

JUDGE TO MR. LONG

Q. Are you going to need an interpreter, Mr. Long, or does you client speak English?

A. No, he doesn't speak English.

Q. Okay.

JUDGE FOR THE RECORD

Sari Torritzki (phonetic sp.) is present as the court interpreter translating in the Spanish language.

JUDGE TO THE INTERPRETER

Q. Do you swear that you will accurately translate from English to Spanish in the course of these proceedings, so help you God?

A. I do, Your Honor.

Q. Thank you.

JUDGE FOR THE RECORD

Okay, present at the Immigration Building in Las Vegas, Nevada is the respondent Juan Anibal Aguirre Aguirre, A 70 815 341 and his attorney of record is Mr. Long who is an attorney there in Las Vegas.

MR. LONG TO JUDGE

[64]

Q. Your Honor?

A. Yes.

Q. The last name is Aguirre not Aguilar.

A. Oh, okay, Aguirre I just, okay.

Q. Okay.

A. Misread that, you're right. Aguirre Aguirre.

JUDGE FOR THE RECORD

They are present by telephonic speaker phone here in Phoenix.

JUDGE TO MR. LONG

Q. And, do you agree to this telephonic hearing Mr. Long?

A. Yes, Your Honor.

JUDGE TO MR. AGUIRRE

Q. Okay. And, Mr. Aguirre, would you state your full name for the record, please sir.

A. Juan Anibal Aguirre Aguirre.

Q. Okay.

JUDGE TO MR. LONG

Q. Mr. Long, are you prepared at this point to admit service of the Order to Show Cause dated June the 22nd, 1994 and waive reading of the charges and allegations?

A. Yes, Your Honor.

Q. And you have explained to your client, he does understand the nature of these proceedings and all of the rights [65] and matters required for regulation and you waive for the explanation by the Court?

A. Yes, Your Honor.

Q. At this point are you willing to admit the facts, allegations, concede deportability as charged?

A. Yes, Your Honor.

Q. And, are you going to designate a country of deportation?

A. No, Your Honor, we are in that same situation here as we were on the last case.

Q. Okay, so the Court would then designate Guatemala. I assume then that you're asking for asylum?

A. That's correct, Your Honor. Also, this is one that we'd like to renew before the Court, Mr. Aguirre got some help from someone who just did a—well, it's like no application, actually.

Q. Okay, so you're going to file a new application with the Court?

A. Yes.

Q. Can you do that by February the 1st also?

A. Yes.

Q. Okay. February the 1st, 1995, application due or of course you will waive the right to seek asylum. And then we're still setting for the date in April. Would you like Wednesday the 5th at 10:30? The 5th of April?

[66]

A. Yes, I think that would be fine, Your Honor.

Q. Okay, then that would be Wednesday for this case and then case we previously set would be the next day, Thursday.

A. Let me check with my client and make sure that this will be okay.

Q. Okay.

MR. LONG TO MR. AGUIRRE

Q. How is April the 5th. And it starts at 10:30 a.m.

A. Okay.

MR. LONG TO JUDGE

Q. Yes, that's fine, Your Honor.

A. Okay. So April the 5th, 1995, 10:30 in the morning for the asylum hearing. Anything else?

Q. No, Sir.

JUDGE FOR THE RECORD

Okay. Proceeding's are adjourned then.

HEARING CONTINUED

[67]

U.S. Department of Justice
Executive Office for Immigration Review
Office of the Immigration Judge

File A 70815341

IN DEPORTATION PROCEEDINGS
Transcript of Hearing

Matter of

JUAN ANIBAL AGUIRRE AGUIRRE,
Respondent

Before: JOHN W. RICHARDSON, Immigration Judge

Date: April 5, 1995 Place: Las Vegas, Nevada

Transcribed by DEPOSITION SERVICES, INC.
at Rockville, Maryland

Official Interpreter: Aurora Endrate

Language: Spanish

Appearances:

For the Immigration and Naturalization Service:	For the Respondent:
Richard H. Knuck, Esquire (Trial Attorney)	Joseph W. Long Esquire

[68]

JUDGE FOR THE RECORD

This is Immigration Judge John Richardson sitting in a continued deportation proceeding in Las Vegas, Nevada on the 5th day of April, 1995. The respondent is again present, Mr. Juan Anibal Aguirre Aguirre, A 70 815 341. He is accompanied by his attorney of record Mr. Joseph W. Long, an attorney here in Las Vegas. Richard Knuck is present representing the Government, he is a General Attorney with the Immigration Service out of Phoenix Arizona. And the court interpreter present translating in the Spanish language is Aurora Endrate (phonetic sp.).

JUDGE TO MR. LONG

Q. Does your client speak any English?

A. Very limited.

Q. So we will be using the interpreter?

A. Yes.

JUDGE FOR THE RECORD

The Court has received an application for asylum which is at this time marked as Exhibit 2. Let's go off the record a moment.

(OFF THE RECORD)

(ON THE RECORD)

JUDGE FOR THE RECORD

Back on the record. That was a telephone call from another Judge to note concerned with this particular case. And in as I was saying, the application, the accompanying D325 and [68A] all of the documents submitted therewith, Exhibits 2 and 3, country reports etc. is collectively marked as Exhibit 2. Exhibit 3 will be the State Department response, which is essentially a profile of Guatemala with a brief cover letter.

JUDGE TO COUNSEL

Q. Are there other documents to be marked at this time?

A. (Mr. Long) I have no additional documents, Your Honor.

A. (Mr. Knuck) Nothing on behalf of the Service, Your Honor.

JUDGE TO MR. LONG

Q. Would you like your client sworn, Mr. Long?

A. Yes, Your Honor.

JUDGE TO MR. AGUIRRE

Q. Mr. Aguirre would you raise your right hand please. Do you swear the testimony that you give in court will be the whole truth, so help you God?

A. Yes.

Q. Okay, now, you need to —. You can put your hand down. But you need to speak up so you can be heard on the record. Nodding of your head and that type of thing doesn't get recorded. Would you state your full name for the record?

A. Juan Anibal Aguirre Aguirre.

JUDGE TO MR. LONG

[69]

Q. Your witness, Mr. Long.

A. Thank you, Your Honor.

MR. LONG TO MR. AGUIRRE

Q. I want you to listen to my questions carefully. If you don't understand the question, stop me and I want to make sure you do. This is not the Inquisition so relax a little. Can you tell us, Mr. Aguirre, where you were born?

A. Palandeia Avoblanca Jutiapa, Guatemala (phonetic sp.).

Q. And when were you born?

A. Um, the 20th of October of 1969.

Q. And, where did you live in Guatemala?

A. In the same address.

Q. And how long did you live there?

A. For eighteen years.

Q. Is that your entire life?

A. Yes.

Q. Did you attend school in Guatemala?

A. Yes.

Q. The University?

A. One year.

Q. And, any other institutes?

A. I went to six years in primary school, three years to the Institute of nationale (indiscernible), and basic education and ah, three years at the Institute of College, [70] Private College of National private college institution.

Q. And what did you study at the National?

A. Accounting.

Q. And did you graduate from there?

A. Yes.

Q. With a degree in Accounting?

A. Yes.

Q. Did you work in that field?

A. One month.

Q. While in school were you active in the student union?

A. Yes.

Q. Is that also known, as the Estudeante Syndicado (phonetic sp.)?

A. Yes.

A. Yes.

Q. How long were you a member of that organization?

A. From '89 to '92.

Q. Did you have a leadership position in that organization?

A. Yes.

Q. Can you describe that?

A. It was called a directive of the college.

Q. And that is, that is his position with the student body representatives?

A. Yes there was a special board of directors.

[71]

Q. Okay. I'm talking now about the Estudeante Syndicado.

A. Yes.

Q. Were you a member of that organization?

A. Yes.

Q. Is that different from a student directive?

A. Yes.

Q. What was your position in the Syndicado?

A. I was in charge of operating everything that rest of the students to know about activities.

Q. And what kinds of activities were you involved in?

A. In everything we want to do the study of the students.

Q. In the Syndicado position what activities was he involved in? With the Syndicado?

A. Uh, what I was doing within the syndicate of the students was to promote all the strikes of the students.

Q. Can you describe that organization at Jutiapa?

A. Yes.

Q. Please do.

A. We were 22 associations, and in the total we were about a 1000 participants.

Q. And what were the activities that this group involved themselves in?

A. Whenever there was a body of someone killed, a [72] student killed, we would go out and then just strike, you know, all by either burning buses, breaking windows or just attacking the police, police cars.

Q. Were any of your activities ever related to government decisions?

A. Yes.

Q. Would you protest their decisions?

A. Yes.

Q. What types of decisions would prompt protests?

A. We would, we would manifest against the high crisis of the fare in the buses for students.

Q. Were you concerned about human rights?

A. Yes.

Q. How would that manifest itself? What types of human rights were you concerned about? And what types —.

MR. LONG TO INTERPRETER

Q. Well, let's ask that question first.

MR. AGUIRRE TO MR. LONG

Q. Uh, during this, at this time, we were concerned because of the human rights that you were concerned about. 'Cause whenever there was a person that appeared or just was found dead, uh, whether it was a student or another person, uh, they were never investigating. They were always overlooked whatever had happened. And they never investigated the culprit in that.

[73]

A. Was the government aware of the existence of this organization?

Q. Yes.

A. How do you know that?

Q. Whenever I watched TV there was always this news about asking the, uh, group of student to calm the situation, to, uh, resist from, from doing this.

A. Did the government know that you were a member of this group?

Q. I don't know if the government knew about my participation or my being a member of this organization. But, I do know that they have a list of all the students and they also have the names or the list of those who are outstanding in their activities.

A. Do you know if you were on any of those lists?

Q. Yes.

A. How do you know that?

Q. Because the director of the uh, um, uh, college takes care of sending the list of all the students.

A. Did the government ever threaten you?

Q. I don't know if it was the government or what, because there were three groups, but I am assuming that there were anonymously representing the government of those who threatened me.

A. So there were anonymous threats?

[74]

Q. Yes.

A. What did they say?

Q. The notes would say to stop doing what we were doing and to be more peaceful. Otherwise we would have to attain ourselves to whatever the consequences would bring.

A. What did he thought that that meant?

Q. We understood this as being that those who were outstanding in this list were the ones who were the leaders of these, uh, demonstrations and of these acts, so they were addressing us to stop that and it was directed to us.

A. More than one threat received?

Q. Yes.

A. What did the additional threats say?

Q. They almost say the same thing.

A. Did any of the threats ever state that the leadership of the group would disappear?

Q. Yes.

A. Why did he think that they were from the government?

Q. Uh, in the last two that we received, on the paper it said official from the government.

A. So it was on government letterhead?

Q. Yes.

A. So, really it was not completely anonymous.

Q. It was only the stationary paper, but it was not [75] signed by anyone.

A. Were you also involved in the student body?

Q. Yes.

A. What position did you hold in the student body?

Q. I was Vice President of it.

A. How long were you in that position?

Q. For six years.

A. What were your duties in that position?

Q. My position there and my responsibilities dealt with being on guard always to watch out for how well or how, um, the demonstrations were being carried out and to do the utmost of it, so that everyone, all the members would be notified of it. I was in charge of that.

A. Did the student body also work with the faculty of the college?

Q. Yes.

A. What would that activity involve?

Q. First we was in charge of receiving all the information and then we would pass around to all the rest of them.

MR. LONG TO JUDGE

Q. If I might, Your Honor, I want to just talk to Juan just a second. He had two positions and I think because he's nervous he's getting the two confused.

A. Okay one was the—.

[76]

Q. The Estudeante's—.

A. The Aquablanca? Is that the one? Is that the student—?

Q. It's called—the name of the organization is the Estudeante Syndicado.

A. Okay, that's the student body then, the Syndicado?

Q. Actually it isn't, it was a group, a subversive group that he had a leadership position in it.

A. Well, it looks, I'm looking at his application, it says he was a leader in the Aquablanca and then apparently the Syndicado was some type of an umbrella group, I guess and then of course there was the student body. So it looks like they're probably three different.

Q. Actually we'll try to clarify that in our questioning, but there really are only two. Aquablanca and in that application where it says he was the leader of the Aquablanca group in Jutiapa. Jutiapa is a—.

A. A sail?

Q. —state.

A. Oh.

Q. Aquablanca is the city and he was a leader in the Aquablanca cell in Jutiapa.

A. But was that part of Syndicado?

Q. Syndicado Estudente.

A. Okay.

[77]

Q. He also was the vice president of the student body.

A. Okay.

Q. And I don't know if it's —

A. It's— it's—

Q. Okay, maybe this is what we need. He refers to it in Spanish as the Directiva. And maybe my use of the words is causing him confusion here, because he—

A. Well, it's also possible that his activities overlapped, too. Well, you, go ahead and you can try to clarify that.

Q. Okay. Thank you.

MR. LONG TO MR. AGUIRRE

Q. Well, I'm asking you now about the Directiva (phonetic sp.).

JUDGE TO MR. LONG

Q. And that refers, Mr. Long, to the student body?

A. Vice president student, yes, that's an official capacity rather than one that's—

Q. Okay.

MR. LONG TO MR. AGUIRRE

Q. Do you understand?

A. (In English) Yeah.

Q. Okay. In the Directiva you were vice president?

A. Yes.

[78]

Q. Your duties were more official than in—?

A. Yes.

Q. Than in the student syndicate?

A. Yes.

Q. And what were your duties as the vice president of the Directiva?

A. My obligations or responsibilities was to have everything in order to maintain everything in order at the, uh, college.

Q. What did that involve?

A. We were like in charge of everything there was to be done. If there was to be a strike then we were the ones to notify all of them, all of the members.

Q. Did the Directiva also represent the students with the faculty if they had grievances?

A. Yes.

Q. Were there formal procedures for handling those types of problems.

A. Yes.

Q. And were you involved in that process also?

A. Yes.

Q. Is that a position that is a high profile position in the sense that most students and faculty or people in the University knew that you were in that position?

A. Yes.

[79]

Q. Would they also know that you were involved in organizing strikes officially through the Directiva?

A. No, the Directiva or this, uh, group was only in charge of the students and of the notifications of it.

Q. Notifications in what fashion?

A. They would notify them as to what day they would take place a strike or a manifestation where we would go out and burn buses and break things.

Q. What's the difference between the Directiva and the Estudeante Syndicado?

A. The Directiva is only in charge of whatever concerns the college, while the syndicate is something of a national group.

Q. So, his membership in both groups, he was involved in a lot of the same activities?

A. Uh, within the Directiva we would just, um, plan, or get together and plan that if we did not like a particular professor or his ways we would then make a purpose of, displacing him, by taking him out of the faculty.

Q. As well as organizing strikes?

A. (In English) Yes.

Q. Did most of the students and the faculty at the school know you were in the Directiva?

A. (No audible response.)

Q. No, no, I mean the organization you were the vice [80] president of.

A. At the college?

Q. Yes.

A. Please repeat the question.

Q. Did most of the students and faculty at the college know he was a vice president in the Directiva?

A. Yes, because they were the ones who were electing us.

Q. Okay. Did most students and faculty know that the Directiva was also involved in a lot of the activities that the members of the Estudeante Syndicado were involved in?

A. Yes.

Q. Were any of the Estudeante Syndicado members ever harmed? Let me, let me—.

A. I am confused between the faculty of the—.

Q. Let me, let me rephrase the question. I'm using the term incorrectly. The organization is the Syndicado Estudeante, were any members of that organization ever harmed?

A. Yes.

Q. What happened to them?

A. Five persons that were members of the student syndicate, they were found dead in different areas, in different parts of a area?

Q. Does he know when that occurred?

A. It happened through a period of in six months. It [81] happened quite often.

Q. What year?

A. It was between '89 and '92.

Q. Does he know how they were killed?

A. I read in the newspaper that five of them had been killed, one had been kidnapped and then five days later he appeared, but he was dead. He was found dead.

Q. Does he know who killed the others?

A. Uh, they appeared to be like unknown persons, but in one of them it turned out to be that it was the guerrillas. And, in another group of students we thought it was the government who was doing this, because, uh, they never investigated who it was, and there was a closed case.

Q. So, he suspected the government, because they would not investigate these cases?

A. Yes.

Q. Were the guerrillas aware of your activities?

A. They will know all about our activities, because they have people who infiltrate the groups.

Q. Did you ever have any encounters with them?

A. Yes.

Q. When?

A. There were three men, this happened in the football field, uh, three men completely armed and in uniforms came to tell us if we didn't cease doing these things, we better [82] stop doing this activities, because then we will have to face the consequences of this acts. And that a friend of mine, Carlos Gonzales, uh, also was there and we were told that if we did not stop, the consequences could be very bad. They asked us to join them, because they did not want to have any competition from any other group.

Q. So, when a guerrilla tells you, face the consequences, what does that mean to you?

A. That we will be then, uh, killed.

Q. Do you think the guerrillas could kill you?

A. Of course.

Q. Do you think they would?

A. Yes.

Q. They asked for the support of the Syndicado Estudeante?

A. Yes.

Q. And you refused to support them?

A. Yes.

Q. You stated they were in uniforms, can you describe the uniforms?

A. Uh, the difference between, uh, the government and the guerrillas are that they have the same color of uniforms, that olive green color, uh, but they do not wear a hat, they wear them down on their heads.

Q. And that's what these men were wearing?

[83]

A. Yes.

Q. What was the date of this ruffling?

A. I don't remember the day, exactly, but it was around June or September.

Q. What year?

A. Of '92.

Q. Do you know if the guerrillas ever harmed any members of the Syndicado Estudeante?

A. Yes, this is the time when they took one of them, uh, the members and later he appeared dead.

Q. Where did that occur?

A. - In the capital?

Q. Guatemala City?

A. (In English) Yes.

JUDGE TO MR. LONG

Q. Before I get totally confused, I thought you had asked him about the Syndicado when he was talking about the five members dead?

A. Yes. I was.

Q. Okay, so we're back—. Okay.

MR. LONG TO JUDGE

Q. This is on the record let me just try to clarify it.

A. Well he talked about the kidnapping in connection with the five, so—.

[84]

Q. Correct.

A. The way you asked that I thought maybe you were asking about the Direct—?

Q. The Directiva. No.

(OFF THE RECORD)
(ON THE RECORD)

JUDGE FOR THE RECORD

Tape two, April the 5th, 1995 in Las Vegas. The A Number is 70 815 341.

JUDGE TO MR. LONG

Q. You may continue, Mr. Long.

MR. LONG TO MR. AGUIRRE

Q. Have any of your relatives ever been harmed by the guerrillas?

A. Yes, an uncle of mine.

Q. What happened to him?

A. An uncle of mine, when he returned from the United States, and he went to pick up his card at the border of Mexico, of Guatemala, he was kidnapped and he was carrying an ID, a military ID and he was then later, he was kidnapped and was later found dead.

Q. Do you know why they murdered him?

A. Because he was carrying a military card.

Q. Were the guerrillas aware that he was your uncle?

A. No.

[85]

Q. Were you in the military?

A. (In English) Yes.

Q. Describe your military service, please?

A. I served in the military in Guatemala for three times a week, 12 times a month and for three months, when it was at the end of the year of the school year.

Q. And how long were you on active duty?

A. For one year.

Q. Did you ever have any difficulty as a result of that military service?

A. Uh, not while I was there, but if the guerrillas ever find me or the military ID then they will kill me.

Q. Were you active in any political parties in Guatemala?

A. Yes.

Q. Which one?

A. UCN.

Q. What does that stand for?

A. Uh, National Central Union.

Q. Were you active in that party?

A. Yes.

Q. What did you do?

A. I was in charge of the celebrations of the party and also in the protests against the government.

Q. Did you help organize rallies?

[86]

A. Yes.

Q. Did you help recruits, new members of the party?

A. Yes.

Q. As a result of that membership were you ever threatened?

A. Yes.

Q. Who threatened you?

A. A member of the official, uh, government.

Q. Who was that?

A. Uh, what do you mean?

Q. What was his name?

A. The one who threatened me?

Q. Yes.

A. His name was Julio Palmanale (phonetic sp.)

Q. What was his position?

A. He was, uh, a member of the congress.

Q. What did he tell you?

A. He wanted me to stop to, to stop recruiting people to join the, uh, UCN and, uh, to join his party instead.

Q. And what did he threaten you with if you didn't do as he asked?

A. Because, he was the highest authority there, he told me that if I did not do what I was being asked by him that I should then, count on the consequences and would see what would happen to me.

[87]

Q. And what did that mean to him?

A. To me that was a threat.

Q. A threat of what?

A. I don't know. I did not know what to expect from him since he was, uh, a very, uh, high level official and almost everyone fear him.

Q. Did he think he would be harmed?

A. Yes.

Q. Did you quit the party?

A. From the party of where I was, no. Until I came here.

Q. When did this occur?

A. On January 2nd of '93.

Q. What occurred on January 2nd of '93. Yeah, you just gave me a date.

A. That day is the day I left the country to come here to the United States.

Q. Okay. When was he threatened by the government official?

A. It was about five days before, uh, Christmas.

Q. What year?

A. Of '92.

Q. Who was the leader of that party that you were a member of?

A. Horhey Capin DeCourt (phonetic sp.).

[88]

Q. Was he assassinated in 1993?

A. Yes.

Q. Do you know who assassinated him?

A. The newspaper reports that they don't know who did it and up 'til now no one has investigated it.

MR. LONG TO JUDGE

Q. Okay, Your Honor, in the country report, 1993 of Amnesty International the speculation is that he was assassinated by extra-judicial members affiliated with the former president.

MR. LONG TO MR. AGUIRRE

Q. Was any harm done against other party members?

A. Yes, two of his body guards, on the day he was killed, they both resulted wounded. They were wounded.

Q. Were there any other acts of violence against it. Is he aware of any other acts of violence against general party members?

A. When I was there or after I left?

Q. That he's aware of?

A. No.

Q. When did you decide to leave the country?

A. On the the 7th of January of '92.

Q. Why did you decide to leave at that time?

A. I had a friend, uh, in the, uh, congress, whose name was Ferdi Erganza (phonetic sp.) and he told me that the government was planning to kill some of the students and that [89] I might be a member of those who were targeted to be killed.

Q. Who is Ferdi Erganza?

A. He was a representative in the congress of the republic.

Q. How would he know that information?

A. Because he was a big politician and he knew everything there.

Q. Why would he tell you?

A. Because, uh, I was a member of a football team of which he was the owner and he was very fond of me.

Q. So you were friends?

A. Yes.

Q. And he was worried about you?

A. Yes.

Q. Do you know if there were actually any executions following Ferdi's warning?

A. I couldn't tell you because I left and then came here to the United States.

Q. Have you been contacted by anyone in Guatemala since leaving Guatemala?

A. With my family.

Q. Have you heard from your former school director?

A. Yes.

Q. How did he contact you?

A. He found, he asked my family for my address and he [90] wrote me a letter.

Q. What did the letter say?

A. He told me to prolong my stance here in the United States, because people that I, or persons not identified were coming there to look for me.

Q. Do you know who they would be?

A. It could be people from the government or could it be, uh, guerrillas.

Q. Why would they be looking for you?

A. Because as member, member of the students and because I was so involved in the politics over there.

Q. Do you have any reason to thinks anyone aside from a government representative or guerrilla would be looking for you?

A. Yes.

Q. Who would be looking for you besides the government or the guerrillas?

A. You mean without being those two parties?

Q. Right.

A. I don't have anyone else.

Q. That really was what the earlier question was, would anyone besides them be looking for?

A. It could be a secret group that the government has.

Q. Here's the question. Does anyone have—. Does [91] he have any reason to think that anyone would be at the school looking for him who was not involved in those two groups?

A. No.

Q. Do you owe anybody any money or anything of that nature?

A. No.

Q. Do you have any family in Guatemala?

A. Yes.

Q. How many members of your family are there?

A. There are my parents, two brothers and two sisters.

Q. Where do they live?

A. In Aquablanca.

Q. Do you fear returning to Guatemala?

A. Yes.

Q. Why?

A. Because, right now the guerrillas are really out in a crazy way looking for people who were members of the military just so they can kill them.

Q. And are you worried about the government as well?

A. Yes, I do fear that the government also, uh, will look for me, because since they knew that I was an

important member or at least, uh, a person that was outstanding and a notoriety in the group of the students there, that they would be looking for me.

[92]

Q. Are you willing to return to Guatemala?

A. No.

Q. Do you think the government would be able to control those who are threatening you?

A. If the government that is there now?

Q. Yes.

A. I will not be able to tell you now, because I an not well informed as to how the government is doing there now.

Q. You would not be willing to go?

A. No.

MR. LONG TO JUDGE

Q. I have no further questions.

JUDGE TO MR. KNUCK

Q. Mr. Knuck?

A. Thank you, Your Honor.

MR. KNUCK TO MR. AGUIRRE

Q. Mr. Aguirre, you say that you personally burned some buses and broke some windows and things in some of these organized uprising in that you were involved?

A. Yes.

Q. On how many occasions did you burn a bus?

A. Uh, during the time of '89 and '92, all those years, we burned buses.

Q. Okay. And, how many buses do you think you burned during those three years?

[93]

A. Myself or all the association?

Q. Yourself.

A. In our group, about 10, at the time.

Q. And, how would you burn them? Would you splash gasoline on them? Or exactly how?

A. Yes. We was, uh, just, uh, uh, splashing with gasoline and then burned them and then burn the tires and all.

Q. And, were there any people on board these buses when you did this?

A. No, because we would stop the bus, help all the people, uh, get out of the bus, and then because there were so many, we would just stone them and make them get away and then burn the bus.

Q. To your knowledge, was anyone hurt during any of these bus burnings or stonings?

A. Of the students or the other people?

Q. The other people?

A. No, we just hit them if they did not want to get off the bus.

Q. How did you hit them? Did you strike them with a club? Or, how?

A. We would have sticks, you know, to hit them with or we would just tie them with ropes. But, if they be, I mean if they hit our, uh, bus then we get off the bus.

Q. And, these people who were on the bus were just [94] ordinary citizens of Guatemala?

A. Yes.

Q. And, you say one of the reasons you burned buses was to protest the high prices of the bus fares?

A. Yes.

Q. When you were burning these buses and throwing rocks and things at people did you cover your face

with a bandanna or in some other way hide your identity?

A. Yes, we would cover our faces.

Q. And, during the times that you burned the buses, you say you also broke windows and other things?

A. Yeah, we would break the windows of the stores and we would just take, I mean, um, uh, raid the stores. Taking everything they have.

Q. So, you were, in other words, looting the stores?

A. No, we did not steal from the stores, we simply took the people out of the stores that were there. And we would throw everything on the floor.

Q. But you never stole anything?

A. No.

Q. The people who were in the stores, did you treat them in a similar fashion that you treated the people on the bus, that is throw rocks at them and hit them with sticks and tie them with ropes in order to get them to go?

A. If they did not try to do anything to us, we would [95] not do anything to them. Because, we would always explain to the people who were there in the buses, for instance, why we were doing this and why we were protesting and doing these things, because of the

high, um, fares that the buses had. Some of them would even, uh, support us.

Q. I assume that burning the buses and breaking the windows and such things is a crime in Guatemala?

A. Uh, it doesn't seem to be a crime, but if we are caught, we would have to be jailed then.

Q. So, I would further assume that if the government did know your identity as one of these people in the groups that were burning the buses, that they would come and arrest you and put you in jail?

A. Only if they catch us, because usually whenever the police come, we always fight the police. And so if when they, uh, catch one of us.

Q. Are you saying that if the police knew of your identity as one of the people who had, let's say, burned a bus two months ago, they wouldn't come and arrest you?

A. Yes, but, uh, they could not identify us because we were always well covered, well, ah, protected.

Q. I guess that's my point, sir, that you were never arrested and jailed, the government didn't know that you were doing these activities? Is that correct?

A. They have a list of all the students that are in [96] the ministry of education because they get a list of all those who are students and they know who is doing what. But, within this, uh, long list and large group of students, the police never really knows who is the

leader and who is the one who is actively participating in this.

Q. Now, Mr. Aguirre, you mentioned that some people that you identified as guerrillas came to you and asked you to stop your activities. And I assume that those activities were burning buses and breaking windows?

A. What they did not want is another group to make competition for them and have other groups do the things to the government.

Q. So, you were burning the buses that they wanted to burn? Is that right?

A. Yes.

MR. KNUCK TO JUDGE

Q. I have nothing further, Your Honor.

JUDGE TO MR. LONG

Q. Re-direct, Mr. Long?

A. Yes, Your Honor, just a few questions.

Q. Before you do that, let me ask him just one thing, if I might?

A. Sure.

Q. Okay.

JUDGE TO MR. AGUIRRE

[97]

Q. Mr. Aguirre, on your application, you indicate that, and I'm talking about the member of congress who told you about student leaders being targeted. In your application, you indicate after you came to the United States, or after you left Guatemala,—

INTERPRETER TO JUDGE

Q. What did you say, Sir?

A. I understood —.

JUDGE TO MR. AGUIRRE

Q. In your application, you indicate that after leaving Guatemala you became aware of what happened regarding your information that student leaders were going to be killed. Do you understand what I'm talking about?

A. I didn't have a better explanation (indiscernible.)

Q. Okay. You said that around January of 1993, a friend of your in congress told you the government was planning to kill some student leaders and that you might be on the list and you indicated that is why you left Guatemala January the 7th, because you yourself thought you might be on the list.

A. Yes.

Q. After leaving Guatemala did you learn if any student leaders were harmed or killed?

A. Uh, yes, I learned in California through the news, in the newspaper that I read, that one of our members of the, uh, [98] syndicate, uh, the student syndicate had been killed, but other members, about four other members, came this way too. They left Guatemala and came this way.

Q. So, was this a student leader from your department?

A. Not of our department. He was not of our department, but he was from the same area in the um, uh, from the East or West, of different state.

Q. How many student leaders departed in January of 1993?

A. Four of us came?

Q. Including yourself?

A.– Yes.

Q. Okay.

JUDGE TO MR. LONG

Q. You have it, Mr. Long. I'm sorry, you may continue.

A. Thank you, Your Honor. With regard to your questioning, I've prepared this document and it states

that one of the leaders, the leader executed was in his department. That is an error that I need to take blame for, I think, it's difficult sometimes to communicate with Mr. Aguirre and I think that I may have misunderstood him and so I apologize for that.

MR. LONG TO MR. AGUIRRE

Q. With regard to the police in Guatemala—? I [99] don't want to make this question too long. Mr. Knuck asked if the police would come after you if they knew that you broke windows.

A. If they knew it was me, yes.

Q. Does he know how the police operate?

A. Yes.

Q. Did they investigate murders in Guatemala?

A. When it is a particular, I mean a private citizen, they very seldom investigate.

Q. Why would they be after people who break windows if they're not after murderers?

A. They base themselves on what they see at the time and those where they captured and take them. And this is much easier for them.

Q. You mean they wouldn't come after you if they found about you later?

A. Uh, if it is the first time, uh, they will not, but if they find out that continually I am the person involved then they will get a judicial order and come and get me.

MR. LONG TO JUDGE

Q. I have no further questions.

A. Any further evidence, Mr. Long?

Q. No, Your Honor.

JUDGE TO MR. KNUCK

Q. Any evidence from the Government?

[100]

A. No, Your Honor.

JUDGE TO MR. LONG

Q. Summation, Mr. Long.

A. Yes, Your Honor. I'd like to say that Mr. Aguirre is a you man from Guatemala and that in itself is probably a class that has one of the highest mortality rates in the world. As a student in Guatemala he was involved in a number of organizations that had presented high profiles to the government and to the guerrillas. He was involved in the student's Directiva or the student body of directors. He was also involved in the UCN political party and he was involved in the Syndicado Estudeantel involved in a lot of politically oriented activities. As a student leader he was involved

in a nationwide group that was involved in a protest against the government. He also was a, as I said, involved in the political party whose leader was assassinated and was targeted by extra-judicial groups for violence. And as a member of the military reserve he was also at risk. He was persecuted, I would submit, in that threats have been made against his life by what he believed to be government agents and by guerrillas.

And in Guatemala, more than any other place in Central America, a threat is as good as a death warrant and they certainly carry them out with alarming regularity. Because he has been a leader in these groups and he has been active in a lot of political activities, I would submit that the activities that [101] he's been involved are political activities that protest against the government and if they do take the form of violent protest, then, be that as it may, those are protests and he's stating his political opinion and have taken a position and he has been threatened for that. I think that his fear, based on the environment in Guatemala, that is worsening even now, meets the standard of a subjective and objective fear of persecution. And that in as stated in the—I can't read my writing—Aguilare Acota (phonetic sp.) in the 9th Circuit. Considered within the entire community of events, considering the country that he's from, considering the activities that he's been involved in and the threats that he has received, that he has proved to the Court that he has a reasonable fear of persecution. That his fear of returning to Guatemala is valid and that a reasonable person in similar circumstances would be correct in fearing persecution. He doesn't have to show that he would definitely be persecuted if he returned. He doesn't necessarily have to show that he has been

persecuted, but that he has a reasonable fear. And in *Cardoza*, one of the examples cited by the Court, offered a chance of ten percent even, as long as his fear is reasonable and, I believe that it is, in this case, we'd like to ask the Court to grant his application for asylum. I believe the agencies that he has encountered down there have proven time and again that they are capable and willing of murdering anyone that they suspect of harboring any type of political opinion that runs counter to [102] them. And he's certainly been involved in enough activities to have attracted enough interest and made enough enemies of people who would certainly kill him. And that's all I have to say.

Q. Mr. Long.

JUDGE TO MR. KNUCK

Q. Mr. Knuck?

A. Thank you, Your Honor. Well, Your Honor, I think that there's a couple of grounds that you could deny the request for asylum on. First of all, I think all of the activities and the quote threats that he's related to the Court today are very conclusory and never really very exact toward him and I think he's awful dog garn lucky that nothing did happen to him considering his activities and by the rightful long arm of the government. Counsel for respondent called the group subversive, I think he's a terrorist, I think you could deny his application on the basis of being a terrorist.

(OFF THE RECORD)

(ON THE RECORD)

JUDGE TO MR. KNUCK

Q. You may continue.

A. Thank you, Your Honor. As the Court well knows, being a terrorist is a bar, an absolute bar to a request for asylum. And he testified that between the years of '89 and '92 he burned 10 buses and hit people with sticks and stoned them and tied them up with ropes, and these are just general population [103] who were riding the bus. I call that terrorism. Breaking, just random violence. Breaking the windows of stores and treating those people in the same fashion, just against high prices of bus fares, that's a—you know, if he were caught by the police there would be very, very severe penalties. If he did it here there would be awfully severe penalties for doing those kind of things.

And it rises, of course, to the level of aggravated felon also. Even though he hasn't been convicted of anything, he's admitted to the essential elements of arson and general mayhem. And, of course, he fought the police too. It's obvious that the police don't know that he's doing this or they'd have him in jail right now. And rightfully so. He may be on some list as being a student at a school, but I don't think he's on any kind of list of the government. The letter, that letter that came, I believe he said that there was a governmental letterhead threat letter to him saying that he better be more peaceful or face the consequences. I think he had a friend in the police department, because that's awfully friendly advice. Essentially they're saying, if you get caught doing this, there's going to be a high price to pay. As it should be. And then he also testified that he's going to have problems with the guerrillas because

he's competing for their limelight of burning buses and things. I don't think that's persecution, Judge, that sounds like war and gamefare to me. I just don't believe that there is [104] any basis to grant his request for asylum and certainly should not grant him voluntary departure based on the grievous crimes that he's committed.

JUDGE TO MR. LONG

Q. Any response to that, Mr. Long?

A. Yes, Your Honor.

Q. Is your client a terrorist?

A. No, I don't think he is, Your Honor. I think he is a college student in a country that has a rich history of brutal murder of anybody that's moving about. As a young man, he did not have many alternatives in Guatemala. And to voice political opinion or try to, I think in Guatemala, to try to effect constructive change through any process other than one that involves aniniminity is to take your life into your own hands. He was involved in student government at the school that he was into. And it's well documented in the information from the State Department and other sources that student leaders had a high mortality rate. Here in the United States, I am sure that we are in a totally different situation, when one talks of burning a bus or breaking windows to try to make a point, that's not necessary here, that's not the way life is in this country and I'm sure we're all grateful for that. I know Mr. Aguirre is here because of the peace and stability and the freedom that is offered. In Guatemala, if you try to use the legitimate avenues of political expression,

unless you are well connected with a [105] powerful armed force to protect you, you are risking death. I don't believe Mr. Aguirre is a terrorist. He has not manifested any type of criminal behavior since he's been in this country. He successfully graduated from an institution of higher learning in that country and could have pursued, if he were able to, a professional career as an accountant. If this application is denied today, I would ask the Court to allow Mr. Aguirre to exercise voluntary departure. He is not a threat to this community or to this country. And I would urge the Court to grant his application for asylum, because there is a very real possibility that he will die if he returns to Guatemala. They don't put them in jail down there, they take them out in the woods and they shoot them.

Q. Very well.

JUDGE RENDERS ORAL DECISION

JUDGE TO MR. KNUCK

Q. Does the government wish to reserve appeal?

A. Yes, Your Honor.

Q. Okay. That appeal if you decide to file it, will be due no later than April the 17th, 1995. Failure to file by that date will constitute a waiver of the right to appeal and my decision will become final.

JUDGE FOR THE RECORD

And these proceedings are concluded.

HEARING CLOSED

[106] CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE JOHN W. RICHARDSON in the matter of:

JUAN ANIBAL AGUIRRE AGUIRRE

A 70 815 341

LAS VEGAS, NEVADA

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office of Immigration Review.

/s/ LAURA M. DEBOY
LAURA M. DEBOY, Transcriber

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May 10, 1995
(Completion Date)

Supreme Court, U.S.
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DEC 4 1998
CLERK

No. 97-1754

In the Supreme Court of the United States

OCTOBER TERM, 1998

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

JUAN ANIBAL AGUIRRE-AGUIRRE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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1139

QUESTION PRESENTED

Whether the court of appeals erred in reversing the decision of the Board of Immigration Appeals, which held that respondent is barred from eligibility for the relief of withholding of deportation because there are "serious reasons for considering" that, prior to his arrival in the United States, respondent "committed a serious nonpolitical crime," within the meaning of Section 243(h)(2)(C) of the Immigration and Nationality Act, 8 U.S.C. 1253(h)(2)(C) (1994).

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In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 97-1754

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

JUAN ANIBAL AGUIRRE-AGUIRRE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 121 F.3d 521. The opinions of the Board of Immigration Appeals (Pet. App. 12a-18a) and the immigration judge (Pet. App. 19a-32a) are unreported.

JURISDICTION

The court of appeals entered its judgment on August 8, 1997. A timely petition for rehearing was denied on November 26, 1997. Pet. App. 33a. On February 17, 1998, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including March 26, 1998, and, on March 17, 1998, she further extended the time for filing to and including April 25, 1998 (a Saturday). The petition for a writ of certiorari was filed on April 27, 1998. Certiorari was granted on October 5,

1998. 119 S. Ct. 39. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISIONS AND TREATIES INVOLVED

The relevant provisions of the Immigration and Nationality Act of 1952, 8 U.S.C. 1101 *et seq.*, as amended by the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, that were in effect when this case arose, as well as subsequent amendments to those provisions, appear in the appendix to this brief. That appendix also includes the texts of the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, and the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, *reprinted in* 19 U.S.T. 6259.

STATEMENT

1. a. The Refugee Act of 1980 (Refugee Act), Pub. L. No. 96-212, 94 Stat. 102, amended the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, to provide two statutory avenues of potential relief for aliens who are unlawfully present within or attempting to enter the United States and who face a risk of persecution upon return to their native countries.

First, "if the Attorney General determines" that the alien's "life or freedom would be threatened" in the country of deportation "on account of race, religion, nationality, membership in a particular social group, or political opinion," the alien may be eligible for "withholding of deportation or return." 8 U.S.C. 1253(h)(1) (1994). To be entitled to relief under that provision, the alien must demonstrate a "clear probability of persecution." *INS* v. *Stevic*, 467 U.S. 407, 430 (1984); 8 C.F.R. 208.16(b) (1998) (applicant bears the burden of proof of eligibility for withholding); 8 C.F.R. 208.16(b) (1995) (same; in effect at time of respondent's hearing).

Withholding of deportation protects the alien only against deportation to the country where the persecution risk exists; it does not entitle the alien to remain in the United States or avoid deportation to a third country. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 428 n.6 (1987) (withholding is "country specific").

If the alien makes the requisite showing of persecution risk, withholding of deportation is mandatory. That provision for mandatory relief "shall not apply," however, if "the Attorney General determines that" the alien is covered by one of four statutory exceptions. Thus, paragraph (2) of Section 1253(h) provides:

> Paragraph (1) [mandatory withholding] shall not apply to any alien if the Attorney General determines that—
>
> (A) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;
>
> (B) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;
>
> (C) there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States; or
>
> (D) there are reasonable grounds for regarding the alien as a danger to the security of the United States.

8 U.S.C. 1253(h)(2). If the evidence indicates that one of those four exceptions may apply, the alien bears the burden of proving by a preponderance of the evidence that the disqualifying event did not occur and that he remains eligible for withholding of deportation. 8 C.F.R. 208.16(c)(2) (1998); 8 C.F.R. 208.16(c)(3) (1995).[1]

Second, if the "Attorney General determines," 8 U.S.C. 1158(a), that an alien is a "refugee"—*i.e.*, "is unable or unwilling to return to" his home "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a

[1] The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, Tit. III-A, § 305, 110 Stat. 3009-597, substantially revised and rewrote 8 U.S.C. 1253. The withholding provisions are now codified at 8 U.S.C. 1231(b)(3) (Supp. II 1996). IIRIRA does not govern the present case because its provisions apply only to withholding applications of aliens who are placed in proceedings on or after April 1, 1997. IIRIRA, Tit. III-A, § 309(a) and (c), 110 Stat. 3009-625.

Prior to the passage of IIRIRA, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, Tit. IV-B, § 413(f), 110 Stat. 1269, also amended Section 1253(h) by adding a new paragraph (3). See note 13, *infra*. That amendment also does not govern the present case. It took effect as of the date of enactment (April 24, 1996) and applied "to applications filed before, on, or after such date if final action has not been taken on them before such date." AEDPA § 413(g), 110 Stat. 1269-1270. The Board of Immigration Appeals rendered its decision in this case, and thus took "final action" on respondent's application, on March 5, 1996 (Pet. App. 12a), before AEDPA's enactment date. Paragraph (3) was not carried forward in the revision of the withholding of deportation provisions made by IIRIRA.

In this brief, unless otherwise indicated, we shall refer to the withholding of deportation provisions as they were set forth in former 8 U.S.C. 1253(h) (1994) at the time respondent's application was filed and the Attorney General's decision was rendered.

particular social group, or political opinion," 8 U.S.C. 1101(a)(42)(A)—the Attorney General may, in her discretion, grant the alien asylum in the United States, 8 U.S.C. 1158(a). A person granted asylum is permitted to remain in the United States and may apply to adjust his status to lawful permanent resident after one year. 8 U.S.C. 1159; see also *Cardoza-Fonseca*, 480 U.S. at 428 n.6.

An alien seeking asylum need not prove a "clear probability of persecution," as he must to be eligible for withholding of deportation. He need only demonstrate a reasonable fear or risk of persecution. See *Cardoza-Fonseca*, 480 U.S. at 430-441. While withholding of deportation is mandatory, a grant of asylum falls within "the discretion of the Attorney General," 8 U.S.C. 1158(a), although the INA now renders certain categories of aliens ineligible for asylum.[2]

b. Congress enacted the Refugee Act, in large part, to harmonize United States law with the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6224, to which the United States

[2] Section 604 of IIRIRA, 110 Stat. 3009-690, significantly revised the INA's asylum provision. IIRIRA leaves the granting of asylum to the discretion of the Attorney General. 8 U.S.C. 1158(b)(1) (Supp. II 1996) ("[t]he Attorney General may grant asylum to an alien * * * if the Attorney General determines that such alien is a refugee"). But it now prohibits the Attorney General from granting asylum to six categories of aliens. 8 U.S.C. 1158(b)(2) (Supp. II 1996). One of those categories includes any alien "if the Attorney General determines that * * * there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States." 8 U.S.C. 1158(b)(2)(A)(iii) (Supp. II 1996). That amendment does not govern the present case because it applies to applications for asylum filed on or after April 1, 1997. IIRIRA, Div. C, Tit. VI-A, § 604(c), 110 Stat. 3009-694.

acceded in 1968, 19 U.S.T. 6223-6258. See *Stevic*, 467 U.S. at 416; *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 169 & n.19 (1993). The Protocol, in turn, binds its signatories to comply with Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, *reprinted in* 19 U.S.T. 6259 (to which the United States is not a signatory), and generally adopts the Convention's definition of "refugee," for purposes of identifying who is entitled to the protection of its provisions. Protocol art. I(1) and (2), 19 U.S.T. at 6225; Convention art. I(A)(2), 19 U.S.T. at 6261. The Protocol does not contain any provisions governing the treatment of refugees independent of those incorporated from the Convention. 19 U.S.T. at 6225-6229.[3]

The Convention states, however, that its provisions "shall not apply" to:

> any person with respect to whom there are serious reasons for considering that:
>
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> (c) he has been guilty of acts contrary to the purpose and principles of the United Nations.

[3] For a discussion of the history and context underlying the United States' accession to the Protocol, see *Ming* v. *Marks*, 367 F. Supp. 673, 676-679 (S.D.N.Y. 1973), aff'd, 505 F.2d 1170 (2d Cir. 1974), cert. denied, 421 U.S. 911 (1975).

Convention art. I(F)(a)-(c), 19 U.S.T. at 6263-6264. Those limitations are, in turn, incorporated into the Protocol. See art. I(2), 19 U.S.T. at 6225.

The withholding of deportation provision of the INA, 8 U.S.C. 1253(h)(1), implements Article 33 of the Convention (as incorporated by the Protocol). Article 33 provides:

> 1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

19 U.S.T. at 6276.

The disqualifications from withholding relief codified at 8 U.S.C. 1253(h)(2) parallel the limitations contained in Articles I(F) and 33(2) of the Convention on an alien's eligibility for withholding ("*nonrefoulement*"). See Convention arts. I(F), 33(2), 19 U.S.T. 6261, 6276. Neither the Convention nor the Protocol purports to regulate the terms under which signatory nations may grant or deny asylum. See G. S. Goodwin-Gill, *The Refugee in International Law* 103-105, 107, 119, 121, 225 (1983).

2. Respondent is a native and citizen of Guatemala. Pet. App. 13a. Respondent claims that, from 1989 to

1992, he was a member and leader of the student group Estudeante Syndicado. *Ibid.* Respondent was also active with a political party known as the National Central Union (UCN). *Id.* at 15a. During that time period, the UCN held the largest number of seats in the Guatemalan Congress, and one of the party's leaders was president of the Congress. Administrative Record (AR) 157-158 (the UCN "is legislatively the country's most powerful party").[4] According to the materials respondent submitted in conjunction with his application for asylum and withholding of deportation, the National Central Union "poses as a centrist party but leans decidedly to the right." AR 157.

Respondent estimates that, from 1989 to 1992, he personally participated in at least ten burnings of buses to protest increases in bus fares and the Guatemalan government's seeming inaction in investigating the deaths of student leaders. Pet. App. 13a. Wearing masks to hide their identities, respondent and his cohorts stopped the buses, and then would stone, hit with sticks, or tie with ropes and forcibly remove any passengers who did not leave the bus at their command. *Id.* at 13a, 22a. The buses, which were apparently privately owned, were then doused with gasoline and set on fire. J.A. 47.

Respondent also admitted that his activities as a member of the Estudeante Syndicado extended to vandalizing privately owned shops, forcibly evacuating the stores by beating the customers, breaking the windows, and destroying merchandise. Pet. App. 13a, 17a, 22a.

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[4] A copy of the administrative record in this case was lodged with the Court in conjunction with the filing of our reply brief at the petition stage.

3. In January 1993, respondent entered the United States without inspection. Pet. App. 20a. The Immigration and Naturalization Service (INS) subsequently charged respondent with deportability for illegal entry, 8 U.S.C. 1251(a)(1)(B). Pet. App. 20a. In November 1994, respondent appeared before an immigration judge and, through counsel, conceded that he was deportable. *Ibid.* He applied for asylum and withholding of deportation, claiming that "my political activities and involvement in political groups, including the U.C.N. political party made me fear that I would be persecuted for my political activities and involvement if I returned to Guatemala." AR 128.

The State Department's report on Guatemala, which the immigration judge solicited in conjunction with respondent's deportation proceedings (AR 107), advised that freely elected civilian governments have been in power in Guatemala since 1986 and that peaceful transfers of power between parties have been effected without violence. AR 116. The report noted that "common [criminal] violence has exploded in recent years," *ibid.*, that the "polarized and conflictive atmosphere in Guatemala makes it exceptionally difficult to differentiate political abuses from criminal violations," and that "[r]outinely, criminal acts are painted * * * as political, often without substantiated evidence," AR 111. The report also explained that, while some students have been threatened, harmed, and killed, "students and student leaders are not considered enemies by the government." AR 114. The report concluded that "[m]ost migration from Guatemala seems to be driven by economic hardship coupled with anxiety about criminal and political violence." AR 116.

Respondent testified before the immigration judge, through a translator, that he had received threats

based on his activities as a member both of the Estudeante Syndicado and the UCN. Pet. App. 23a. He claimed that the threats came from right-wing extremist groups, left-wing guerrillas, and the government. *Ibid.* He also feared punishment by the guerrillas for his participation in the military reserves. *Id.* at 26a.[5] None of the evidence and reports submitted by the State Department or respondent corroborated the existence of the Estudeante Syndicado or listed it or the UCN as a target of oppression by the Guatemalan government, right-wing groups, or leftist guerrillas. See AR 108-118, 134-179A.

After a hearing, an immigration judge granted respondent's applications for asylum and withholding of deportation. Pet. App. 32a. The immigration judge ruled that petitioner qualified as a refugee eligible for withholding of deportation and asylum because he faced the requisite threat and well-founded fear of reprisal for his political activities. *Id.* at 28a-32a. The immigration judge rejected the INS's contention that respondent had engaged in criminal activities that barred him from eligibility for withholding of deportation. *Id.* at 30a-31a. The immigration judge then found respondent statutorily eligible for withholding and, in addition, granted him asylum as a matter of discretion. *Id.* at 31a-32a.

4. The Board of Immigration Appeals (Board) sustained the INS's appeal and ordered respondent deported to Guatemala. Pet. App. 12a-18a.[6] The Board held that respondent was ineligible for withholding of

[5] Military service is universal in Guatemala. AR 115.

[6] Respondent never filed a brief with the Board, although he was represented by counsel and his request for an extension of time to file a brief was granted. AR 13-21.

deportation because he committed a "serious nonpolitical crime" prior to his entry into the United States and thus fell within a statutory prohibition on withholding, 8 U.S.C. 1253(h)(2)(C). The Board explained that, in applying the "serious nonpolitical crime" exception to eligibility for withholding of deportation, the Board "consider[ed] it important that the political aspect of the offense outweigh its common-law character," and observed that a crime would not be political if it "is grossly out of proportion to the political objective." Pet. App. 17a.

Evaluating the circumstances of this case, the Board found that respondent's actions in Guatemala "were serious enough to affect the lives of innocent bus passengers, shop owners and their customers," and that respondent's activities with the Estudeante Syndicado "added to the violent atmosphere in Guatemala by burning buses, destroying shops, and stoning, binding, and beating civilians unwilling to cooperate." Pet. App. 17a. The Board concluded that "the criminal nature of [respondent's] acts outweigh their political nature," reasoning that although respondent and the Syndicado "had a political agenda"—opposition to increased bus fares and seeming inaction in the investigation of student deaths—"[t]he ire of the [Syndicado] manifested itself disproportionately in the destruction of property and assaults on civilians." *Id.* at 18a.[7]

The Board also denied respondent asylum, explaining that "the nature of [respondent's] acts against innocent

[7] The Board rejected the INS's argument that respondent's criminal actions in Guatemala constituted terrorist acts, 8 U.S.C. 1182(a)(3)(B)(ii), and that he therefore is a danger to the security of the United States, which constitutes a separate bar to withholding of deportation under Section 1253(h)(2)(D). Pet. App. 17a.

Guatemalans lead us to find that he is unworthy of a favorable exercise of discretion for a grant of asylum." Pet. App. 17a.[8]

5. a. A divided panel of the court of appeals reversed and remanded to the Board. Pet. App. 1a-11a. Reviewing *de novo* the Board's interpretation and application of the statutory provisions governing eligibility for withholding of deportation, *id.* at 3a, the majority held that the Board committed three legal errors in finding respondent to be statutorily barred from withholding of deportation. *Id.* at 4a-7a.

First, the majority held that the Board erred in failing to "consider[] the political necessity and success of [respondent's] methods, weighing their political character against their criminal content." Pet. App. 5a-6a. Characterizing respondent's acts of burning buses, vandalizing private property, and beating civilians with stones and sticks as "crimes against property" and "minor assaults and batteries," *id.* at 4a, the majority observed that "forceful measures" may be necessary to draw a government's attention to a protest when the government "is an accomplice or an accessory to terroristic methods of government," *id.* at 5a.

Second, the majority held that the Board erred in failing to consider whether respondent's crimes involved "acts of atrocious nature," like the "indiscriminate bombing campaigns, . . . murder, torture,

[8] Having determined that respondent was barred from withholding of deportation because of his serious nonpolitical crimes in Guatemala and that those same actions warranted a denial of asylum in the exercise of discretion, the Board found it unnecessary to address the question of respondent's threshold eligibility for either form of relief—that is, whether he had established a clear probability or well-founded fear of persecution if returned to Guatemala. Pet. App. 17a-18a.

and maiming of innocent civilians" at issue in the Ninth Circuit's own prior decision in *McMullen* v. *INS*, 788 F.2d 591, 597 (1986). Pet. App. 6a. The court found it significant that respondent's acts here "fall far short" of those atrocities. *Ibid.*

Third, the majority held that the Board "erred as a matter of law" in failing to consider the severity of the persecution that respondent might face if he is returned to Guatemala. Pet. App. 6a. Quoting the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* ¶ 156 (Jan. 1988), the court reasoned that "[i]f a person has well-founded fear of very severe persecution, * * * a crime must be very grave in order to exclude him." Pet. App. 6a.

Because the court concluded that the Board had committed "errors of law" in its analysis of respondent's eligibility for withholding of deportation, the court also remanded for the Board to reconsider whether respondent should be granted asylum. Pet. App. 7a.

b. Judge Kleinfeld dissented. Pet. App. 7a-11a. He explained that a crime need not be atrocious to bar withholding; rather, in his view, the mandatory bar is triggered as long as the crime is "disproportionate to the objective." *Id.* at 7a-8a (quoting *McMullen*, 788 F.2d at 595). Here, Judge Kleinfeld reasoned, the Board could appropriately conclude, based on respondent's own testimony, that his crimes were disproportionate to his political objectives. *Id.* at 10a. Respondent's acts of stoning and beating civilians, Judge Kleinfeld stressed, "were neither peaceful nor directed at the government" but rather "were violent, and directed at uninvolved people." *Id.* at 8a. Disagreeing with the

majority's characterization of the nature of respondent's violence, Judge Kleinfeld explained:

> Beating people with sticks and stoning them, does not seem "minor" to me. Hitting someone on the head with a stick in the nature of a baseball bat or a stone in the nature of a brick is reasonably likely to cause brain damage. It is hard to imagine a band of masked young men, angry enough to burn buses, being especially gentle and kind as they stone people, hit them with "sticks," and tie them up. * * * The shopkeepers, not their inanimate inventory, were the victims of having their stores trashed. Nor is it evident to me why burning buses and trashing stores is proportional to a protest largely directed at bus fares. (When he testified, [respondent] sometimes forgot to mention that his group was also upset about disappearances.)

Id. at 10a-11a. Judge Kleinfeld then concluded: "The United States should be a haven for innocent people fleeing persecution. It should not be a haven for thugs." *Id.* at 11a.

SUMMARY OF ARGUMENT

In 8 U.S.C. 1253(h)(2)(C), Congress expressly vested in the Attorney General (and her delegates) the authority to determine whether an alien is barred from obtaining withholding of deportation because there are serious reasons for considering that the alien committed a "serious nonpolitical crime" prior to his arrival in the United States. Congress further made clear that, once the Attorney General has determined that there are "serious reasons for considering" that the alien has committed such a crime, the statutory bar is mandatory. In contravention of those clear delegations of

authority, the court of appeals' decision in this case substantially intruded upon the authority and judgment of the Attorney General to administer the INA and to undertake the context-specific and often sensitive determination of whether an alien who engaged in criminal conduct abroad should be granted safe haven in this country. As a result, the court of appeals' ruling inappropriately expands the availability of special humanitarian relief to persons engaged in violent conduct directed at innocent civilians. Accordingly, the judgment of the court of appeals should be reversed.

A. As an initial matter, the court of appeals erred in reviewing the Board's interpretation of Section 1253(h)(2)(C) de novo. This Court has repeatedly admonished that courts should accord the Attorney General and her designate, the Board of Immigration Appeals, substantial deference in construing the terms of the INA. Those principles of deference apply with particular force here, where Congress has expressly hinged an alien's disqualification from withholding on whether the "Attorney General determines" that there are "serious reasons for considering" that the alien committed a serious nonpolitical crime. That standard fairly exudes deference to the Executive Branch; the court of appeals utterly disregarded that delegation.

B. The Board has reasonably concluded that the severity of persecution an alien might face should not influence the determination of whether a serious nonpolitical crime was committed. That factor finds no home in the text of the INA, its legislative history, or the United Nations Convention Relating to the Status of Refugees. The risk of persecution has no bearing on whether a crime was serious or nonpolitical; rather, the court of appeals offered it as a reason to forgive the offense and allow withholding. So understood, the risk-

of-persecution test fashioned by the court of appeals is simply a vehicle for circumventing on policy grounds Congress's mandate that a serious nonpolitical crime disqualifies an alien from eligibility for withholding of deportation.

Consideration of the severity of persecution that an alien faces, moreover, would inject a balancing judgment into Section 1253(h)(2)(C) that is absent in parallel provisions of Section 1253(h)(2). It also presumes, without any basis, that Congress intended the risk of persecution to count twice in the withholding analysis —first, to determine the alien's initial eligibility, then once again to excuse a disqualifying event.

The court of appeals' reliance on the UNHCR *Handbook* was misplaced. As this Court has previously recognized, the UNHCR *Handbook* does not have the force of law and is not binding on the Attorney General. That principle is especially true here because the statutory provision at issue expressly turns upon what the "Attorney General determines"—not what the United Nations High Commissioner for Refugees believes—is a serious nonpolitical crime. Moreover, because the UNHCR *Handbook* is a non-contemporaneous and foreign source—and because it does not purport to interpret the Immigration and Nationality Act enacted by the Congress of the United States—there is no basis for believing that Congress meant for the UNHCR *Handbook* to trump the Attorney General's construction of the INA. That is particularly so where, as here, the Attorney General's interpretation is more consistent with the statutory text and structure. In any event, Congress, in enacting Section 1253(h)(2)(C), already struck a balance between the factors that the UNHCR *Handbook* identifies. There is no ground for a

court to require the Attorney General to strike that balance again on a case-by-case basis.

C. The court of appeals' holding that criminal activity must approach the level of "atrocious" before it will qualify as a serious nonpolitical crime is without merit. The plain meaning of the language Congress enacted refutes such a narrow view, and it is irreconcilable with other provisions of Section 1253(h). That standard, moreover, artificially truncates the Attorney General's ability to permit other important objectives—such as the protection of innocent civilians from violence—to inform the "serious nonpolitical crime" analysis.

D. The court of appeals also erred in insisting that, when determining whether criminal activity is serious and nonpolitical, the Attorney General must give weight to the perceived necessity and success of criminal activity against innocent civilians in attracting governmental attention. Nothing in the text of Section 1253(h)(2)(C), its legislative history, or international law compels the Attorney General to consider those factors. Furthermore, the necessity and success standard may do little to distinguish between political and nonpolitical crimes, and it is likely to reward (and thereby incite) violent, attention-grabbing conduct aimed at civilians. A requirement that the Attorney General must give weight to the perceived need for such conduct in a particular country thus could implicate sensitive foreign policy considerations.

E. Finally, the record in this case amply supports the Board's conclusion that there are serious reasons for considering that respondent committed a serious nonpolitical crime in Guatemala. His admitted and repeated acts of arson (burning buses), stoning and beating of innocent passengers, and destruction of store property qualify as serious crimes. The Board also

reasonably concluded that the targeting of innocent civilians rendered respondent's means disproportionate to his asserted political ends of lowering bus fares and encouraging the government to investigate student disappearances.

ARGUMENT

THE BOARD OF IMMIGRATION APPEALS CORRECTLY INTERPRETED AND APPLIED THE "SERIOUS NONPOLITICAL CRIME" EXCEPTION, 8 U.S.C. 1253(h)(2)(C), TO DENY RESPONDENT WITHHOLDING OF DEPORTATION

Section 1253(h)(2)(C) of Title 8 of the United States Code states that the provision for withholding of deportation "shall not apply" to an alien if the "Attorney General determines" that "there are serious reasons for considering" that the alien "has committed a serious nonpolitical crime" prior to arrival in the United States. To determine whether a particular action constitutes a "serious nonpolitical crime," the Board of Immigration Appeals analyzes whether the "political aspect of the offense outweigh[s] its common-law character." *In re McMullen*, 19 I. & N. Dec. 90, 98 (BIA 1984), aff'd, 788 F.2d 591 (9th Cir. 1986). Crimes that are "grossly out of proportion to the political objective" or "of an atrocious nature" constitute serious nonpolitical crimes. *Ibid.*; see also Pet. App. 17a (BIA applying test to this case).

Neither respondent nor the court of appeals contended that it was impermissible or unreasonable for the Board, in interpreting and applying Section 1253(h)(2)(C), to balance the common-law criminal character of the offense against its political aspects. The court of appeals concluded, however, that the Board was required to include additional factors in the balance: (i) the persecution that respondent might face

if returned to Guatemala, (ii) the lack of "atrocious" conduct, and (iii) the perceived necessity or success of respondent's criminal activity against innocent civilians and private property in achieving his asserted political objectives. None of those criteria appears in Section 1253(h)(2)(C). The court of appeals therefore erred in holding that the Attorney General is required to give them weight. The court of appeals should have instead deferred to the Attorney General's interpretation and application of the Act that she is charged by Congress with administering.

A. The Attorney General's Interpretation Of The Serious Nonpolitical Crime Exception Merits Substantial Deference

The Attorney General's construction of the "serious nonpolitical crime" exception is entitled to substantial deference. As this Court has long recognized, "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). That is especially so with respect to the Attorney General's interpretation of the Immigration and Nationality Act (INA), because the INA specifically provides that, in administering the Act, the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling." 8 U.S.C. 1103(a).

Whether particular conduct is "nonpolitical" or rises to the level of a "serious crime" is not self-evident. Like the phrase "well-founded fear" that was at issue in *INS* v. *Cardoza-Fonseca*, 480 U.S. 421 (1987), "[t]here is obviously some ambiguity in a [phrase] like" serious nonpolitical crime, and that phrase "can only be given concrete meaning through a process of case-by-case

adjudication * * * [in which] the courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program." *Id.* at 448. Nor is the scope of the "serious nonpolitical crime" exception a matter to which Congress has directly spoken. To the contrary, in Section 1253(h)(2), Congress expressly left it to the Attorney General (and her delegate, the Board of Immigration Appeals, 8 U.S.C. 1103(a) (1994 & Supp. II 1996); 8 C.F.R. 2.1, 3.1 (1998)) to "determine[]" the nature of the alien's conduct. Accordingly, the Board's conclusion that the existence of a "serious nonpolitical crime" does not turn upon the atrociousness of the conduct, the risk of persecution, or the necessity and success of the criminal conduct, must be upheld if reasonable. *Chevron*, 467 U.S. at 845.

That principle of deference applies with particular force here for two reasons. First, the Board was not simply construing ambiguous statutory language. It was interpreting a statutory standard that expressly leaves it to the "Attorney General [to] determine[]" if there are "serious reasons for considering" that a disqualifying crime occurred. That formulation—as opposed to one that looks to whether the alien in fact committed a crime and, if so, whether that crime, in fact, was serious and nonpolitical—emphasizes both that the determination is for the Attorney General to make and that her assessment and characterization of the conduct (whether she finds "serious reasons for considering" it to be serious and nonpolitical) is critical.[9] The deference due an agency's interpretation is magnified when Congress directs that the agency's judgment

[9] The "serious reasons" standard is essentially one of probable cause. *McMullen* v. *INS*, 788 F.2d at 598 & n.2, 599.

alone should ultimately control. See *INS* v. *Wang*, 450 U.S. 139, 144-145 (1981) (per curiam); see also *Pierce* v. *Underwood*, 487 U.S. 552, 559 (1988); cf. *Webster* v. *Doe*, 486 U.S. 592, 600 (1988).

Second, the traditional reasons for deference "apply with even greater force in the INS context," because the Attorney General and those acting on her behalf "must exercise especially sensitive political functions that implicate questions of foreign relations." *INS* v. *Abudu*, 485 U.S. 94, 110 (1988); see also *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977) ("[T]he power to expel or exclude aliens [is] a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.") (internal quotation marks omitted).

That basis for judicial caution obtains here. The decision whether an alien who has engaged in criminal conduct abroad should nevertheless be granted safe haven in this country is a context-specific and often politically sensitive determination. As the Attorney General explained, in a case involving the deportation of an alleged member of the Irish Republican Army to Great Britain, "[i]n practice, characterization of an offence as 'political' is left to the authorities of the state," and "the function of characterization itself is one in which political considerations will be involved." *Deportation Proceedings for Joseph Patrick Thomas Doherty*, 13 Opin. Off. Legal Counsel 1, 23 (1989) (quoting G. S. Goodwin-Gill, *The Refugee in International Law* 35 (1983)), rev'd on other grounds, *Doherty* v. *INS*, 908 F.2d 1108 (2d Cir. 1990), rev'd, 502 U.S. 314 (1992). The United Nations High Commissioner for Refugees likewise has recognized that the decision whether the exclusions from eligibility for return ("*nonrefoulement*") apply rests with the contracting State in whose

territory the alien seeks recognition of his refugee status. UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* ¶ 149 (Jan. 1988) (UNHCR *Handbook*).

In sum, "it is clear that the Court of Appeals misconceived the nature of its role." *Chevron*, 467 U.S. at 845. "In this government of separated powers, it is not for the judiciary to usurp Congress' grant of authority to the Attorney General by applying what approximates *de novo* appellate review." *INS* v. *Rios-Pineda*, 471 U.S. 444, 452 (1985). The court's duty thus was not to "substitute its own construction" of Section 1253(h)(2)(C), *Chevron*, 467 U.S. at 844, but to determine if the Attorney General's approach "is not one that Congress would have sanctioned," *id.* at 845. Because the Attorney General's interpretation and application of the Act are reasonable and consistent with the statutory text, the legislative history, and the Protocol and Convention, they should have been upheld.

B. The Board of Immigration Appeals Reasonably Concluded That The Risk of Persecution Upon Return Is Not Relevant In Determining Whether The Alien Committed A Serious Nonpolitical Crime

The court of appeals ruled (Pet. App. 6a-7a) that, in deciding whether to grant withholding of deportation, the Attorney General must balance the seriousness of the alien's crime against the risk of persecution he would face upon return. Because that consideration finds no support in the text of Section 1253(h)(2)(C) and is inconsistent with how parallel provisions have been interpreted, it is entirely reasonable for the Attorney

General not to superimpose that form of balancing onto the statutory framework.[10]

1. Nothing in the text of Section 1253(h)(2)(C) requires the Attorney General to consider the risk of persecution an alien allegedly faces if deported to a particular country in determining whether there are serious grounds for considering that he committed a serious nonpolitical crime before he even arrived in the United States. The risk of future persecution does not alter the seriousness of past criminal conduct. Nor can a persecution risk retroactively transmogrify nonpolitical criminal behavior into a political offense. Indeed, the court of appeals did not suggest that the risk of persecution that respondent claims to face informed the analysis of whether his conduct was either "serious" or "nonpolitical." See Pet. App. 6a-7a. Rather, the court of appeals employed the risk of persecution essentially as an extra-statutory equitable ground for excusing respondent's serious nonpolitical crimes: The court observed that "[respondent] could well be found to be in danger of losing his life if returned to Guatemala and therefore should be excluded *for his crimes* only 'for the most serious reasons,'" and faulted the Board because it "did not attempt to balance *his admitted offenses* against the danger to him of death if returned to his native land." *Id.* at 7a (emphasis added).

Congress, however, did not choose to draft Section 1253(h)(2)(C) to allow the risk of persecution the alien might fear to overcome that alien's serious criminal

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[10] The Ninth Circuit's decision in this regard squarely conflicts with the Eleventh Circuit's decision in *Garcia-Mir* v. *Smith*, 766 F.2d 1478, 1488 n.10 (1985) (per curiam), cert. denied, 475 U.S. 1022 (1986).

record. To the contrary, Congress has mandated that aliens be denied withholding if they have committed serious nonpolitical crimes abroad. See *United States* v. *Monsanto*, 491 U.S. 600, 607 (1989) ("shall" denotes a mandatory intent). For that reason, the Board has specifically and reasonably rejected the very balancing approach the Ninth Circuit has imposed. See *In re Rodriguez-Coto*, 19 I. & N. Dec. 208, 209 (BIA 1985) ("[W]e reject any interpretation of the phrase * * * 'serious nonpolitical crime' * * * which would vary with the nature of evidence of persecution. We cannot find that the language and framework of section [1253(h)] support[] such an approach."). Congress has already struck the appropriate balance between the interests of the individual alien and the political, foreign policy, and domestic interests of the United States that are implicated by sheltering an alien with a criminal past. That is a balance that the court of appeals was not free to recalibrate. *Rodriguez-Coto*, 19 I. & N. Dec. at 209 (reweighing the persecution risk "would in effect transform a statutory exclusionary clause into a discretionary consideration").

2. Section 1253(h) already factors the risk of persecution into the analysis of an alien's withholding claim. To be eligible for withholding of deportation at all, an alien must demonstrate at the outset that he faces a clear probability that his life or freedom would be threatened based on race, religion, nationality, social group, or political opinion. 8 U.S.C. 1253(h)(1); see also *Rodriguez-Coto*, 19 I. & N. Dec. at 209-210 ("[I]t is presupposed that all persons barred from relief by the provisions of section [1253](h)(2) can demonstrate a clear probability that their life or freedom would be threatened on account of their race, religion, nationality, membership in a particular social group, or political

opinion."). The court of appeals identified nothing in the statutory text, legislative history, or purpose of the withholding provision that would justify counting the persecution factor twice—first in determining the alien's initial eligibility, and then in applying the exceptions to withholding relief. Indeed, logic suggests that, if Congress believed the risk of persecution could absolve the alien's prior criminal conduct, there would have been no reason to make the commission of a serious nonpolitical crime a mandatory exception to the provision for withholding of deportation in the first place.

3. Requiring that the risk of persecution be considered again in assessing the "serious nonpolitical" character of a crime would be inconsistent with how the parallel exceptions to withholding relief operate. The other exceptions—applicable to aliens who assisted in the persecution of others, 8 U.S.C. 1253(h)(2)(A); have been convicted of a "particularly serious crime," 8 U.S.C. 1253(h)(2)(B); or pose a danger to the security of the United States, 8 U.S.C. 1253(h)(2)(D)—do not entail any further balancing if the alien is found to fall within their terms. See *Arauz* v. *Rivkind*, 845 F.2d 271, 275 (11th Cir. 1988) (no balancing of other considerations under Section 1253(h)(2)(B)); *Ramirez-Ramos* v. *INS*, 814 F.2d 1394, 1397-1398 (9th Cir. 1987) (no balancing of seriousness of offense against severity of persecution under Section 1253(h)(2)(B)); see also *Doherty* v. *INS*, 908 F.2d 1108, 1128 (2d Cir. 1990) (Lumbard, J., concurring in part and dissenting in part) ("[I]t is mandatory for the Attorney General to *deny* withholding if *he* determines that the alien fails any of the tests in § [1253](h)(2)(A)-(D)."), rev'd on other grounds, 502 U.S. 314 (1992). It is unreasonable to assume, in the absence of any differential language in the statutory

text, that Congress intended subsection (C) to operate as a more discretionary prohibition on the withholding of deportation than its immediate predecessor and successor subsections.

4. Nothing in the legislative history supports the court of appeals' holding that the threat of persecution must be considered again in deciding whether a crime is serious and nonpolitical, and therefore renders the alien ineligible for withholding of deportation. In fact, the legislative history of Section 1253(h) sheds little light specifically on the serious nonpolitical crime exception. The most it suggests is a general intent on the part of Congress, in enacting Section 1253(h) as a whole, to conform United States' law to the Protocol (and thus the terms of the Convention that the Protocol incorporates). See S. Conf. Rep. No. 590, 96th Cong., 2d Sess. 20 (1980) (the withholding provision and its four exceptions are enacted "with the understanding that it is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol"); H.R. Rep. No. 608, 96th Cong., 1st Sess. 17 (1979) ("The Committee Amendment conforms United States statutory law to our obligations under Article 33 [of the Convention]."); S. Rep. No. 256, 96th Cong., 1st Sess. 4, 9 (1979).

Neither the Protocol nor the incorporated articles of the Convention, however, require that aliens who have committed serious nonpolitical crimes be afforded safe haven based on the severity of persecution they might face if deported to a particular country. To the contrary, the Protocol and Convention both exclude altogether from the Convention's protection "*any* person with respect to whom there are serious reasons for considering" that he "has committed a serious nonpolitical crime outside the country of refuge prior to his

admission to that country as a refugee." Protocol art. I(2), 19 U.S.T. at 6225 (incorporating Convention article I, 19 U.S.T. at 6261) (emphasis added); see also N. Robinson, *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation* 67 (1953) ("Section F is couched in categorical language * * *. It follows that, once a determination is made that there are sufficient reasons to consider a certain person as coming under this section, the country making the determination is *barred* from according him the status of a refugee.") (emphasis added). The Protocol, moreover, is not a self-executing treaty. It thus does not confer any rights upon aliens beyond those granted by the implementing domestic legislation. *United States* v. *Aguilar*, 883 F.2d 662, 680 (9th Cir. 1989), cert. denied, 498 U.S. 1046 (1991); *Bertrand* v. *Sava*, 684 F.2d 204, 218-219 (2d Cir. 1982); see also *Haitian Refugee Ctr., Inc.* v. *Baker*, 953 F.2d 1498, 1504 (11th Cir.) (withholding provision of Convention, Article 33, as incorporated into the Protocol, is not self-executing), cert. denied, 502 U.S. 1122 (1992).

The court of appeals relied (Pet. App. 6a-7a) on the UNHCR *Handbook*, *supra*, for the proposition that the severity of persecution must be weighed against the seriousness of the nonpolitical crime. *Id.* ¶ 156 ("[I]t is also necessary to strike a balance between the nature of the offence presumed to have been committed by the applicant and the degree of persecution feared. If a person has well-founded fear of very severe persecution, e.g. persecution endangering his life or freedom, a crime must be very grave in order to exclude him."). The court of appeals erred in permitting that *Handbook* provision to trump the Attorney General's interpretation of Section 1253(h)(2)(C).

First, the UNHCR *Handbook* does not have "the force of law or in any way bind[] the INS." *Cardoza-Fonseca*, 480 U.S. at 439 n.22. "Indeed, the [UNHCR] *Handbook* itself disclaims such force, explaining that 'the determination of refugee status under the 1951 Convention and the 1967 Protocol . . . is incumbent upon the Contracting State in whose territory the refugee finds himself.'" *Cardoza-Fonseca*, 480 U.S. at 439 n.22 (quoting UNHCR *Handbook* Foreword (II)). Moreover, while Congress intended to harmonize United States immigration law with the Protocol as a general matter, Congress gave absolutely no indication that it intended to bind itself (or the Attorney General) to the construction of that document by the United Nations High Commissioner for Refugees. Indeed, because the UNHCR *Handbook* postdates the United States' accession to the Protocol by more than a decade, neither Congress nor the President can be presumed to have accepted its interpretation of the Protocol's terms at the time the United States became a signatory.

Second, while the UNHCR *Handbook* may sometimes "provide[] significant guidance in construing the Protocol," *Cardoza-Fonseca*, 480 U.S. at 439 n.22, there is no basis for giving the United Nations High Commissioner more deference than Congress's designee, the Attorney General, in interpreting an Act of the Congress of the United States, especially where, as here, the Attorney General's interpretation comports with the Act's plain language and legislative history. See 8 U.S.C. 1103(a); *Haitian Ctrs. Council*, 509 U.S. at 171.[11]

[11] In *Cardoza-Fonseca*, by contrast, this Court found the UNHCR *Handbook* helpful when the Attorney General's interpretation was deemed to be inconsistent with the statutory text. See 480 U.S. at 431-432, 438-439. Compare *Haitian Ctrs. Council*, 509 U.S. at 183 n.40 (noting UNHCR *Handbook*'s implicit acknowledgment, consistent with the position of the United States, that Article 33 of the Convention, 19 U.S.T. at 6276, has no extraterritorial application).

Congress's intent to conform the United States' law to the Protocol cannot be equated with an intent to abdicate responsibility for the interpretation and enforcement of federal law to an agency of the United Nations. See also P. Weis, *The Refugee Convention, 1951: The Travaux Preparatoires Analysed* 333 (1995) (during negotiations on the Convention, it was noted that, because "the words [crimes or offences] had a general sense in all countries, each individual legal system would have to place its own interpretation on them.").

Third, in the text of Section 1253(h), Congress itself has already weighed the alien's risk of persecution against the character of his crimes. While the UNHCR *Handbook* anticipates ad hoc balancing in individual cases, Congress chose to strike the balance at a greater level of generality with respect to all aliens who have committed "serious nonpolitical crime[s]." In so doing, Congress, in effect, chose to give uniform weight to persecution risk in the implementation of Section 1253(h), rather than a weight that varies and that must be measured against the seriousness of particular past criminal conuct. The approach suggested by the UNHCR *Handbook*, by comparison, would ease the consequences for aliens facing "severe persecution," while providing that those who face "less serious" persecution would have their crimes scrutinized more harshly. See UNHCR *Handbook* ¶ 156. Thus, the balancing of the threat of future persecution against the severity of past conduct that the UNHCR *Handbook*

discusses took place in the United States at an earlier, legislative stage, and it is manifested in a manner that is structurally distinct from the model the UNHCR *Handbook* mentions. That departure, to the extent it is one, scarcely renders the approach chosen by Congress and the Attorney General improper.[12]

The legislative history confirms that Congress believed the text of Section 1253(h), as enacted, fully complied with the Protocol and its incorporated Convention terms, and that the Attorney General would not have to engage in further balancing or discretionary judgments to conform her administration of the INA to the United States' treaty obligations. When the competing drafts

[12] Because of the structure of the United States' immigration law, incorporation of the UNHCR *Handbook* approach here could have additional untoward consequences. As previously noted (see note 2, *supra*), Congress has recently revised federal asylum law. As amended by IIRIRA, the INA now prohibits the Attorney General from granting asylum to an alien if, *inter alia*, "the Attorney General determines that * * * there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States." 8 U.S.C. 1158(b)(2)(A)(iii) (Supp. II 1996). A ruling that the UNHCR *Handbook*'s approach governs the interpretation of "serious nonpolitical crime" in Section 1253(h)(2)(C) could now mean either that the same definition applies to IIRIRA's amendments to the INA's asylum provisions, even though it is undisputed that neither the Convention nor the Protocol purports to regulate asylum (UNHCR *Handbook*, Intro. (G) ¶¶ 24-25), or that Congress intended the term "serious nonpolitical crime" to have two different meanings within the same statute (see *Reno* v. *Koray*, 515 U.S. 50, 58 (1995) ("[T]he basic canon of statutory construction [is] that identical terms within an Act bear the same meaning.") (internal quotation marks omitted)). The better conclusion is simply that the UNHCR *Handbook* does not displace the Attorney General's interpretation of an Act of Congress.

of the Refugee Act of 1980 went before the Conference Committee, the bill passed by the House of Representatives contained the four exceptions to withholding of deportation that currently appear in 1253(h)(2), including the serious nonpolitical crime exception. See H.R. 2816, 96th Cong., 1st Sess. (1979), *reprinted in* H.R. Rep. No. 608, *supra*, at 47. The House Judiciary Committee believed that its four exceptions corresponded to those in the Convention. H.R. Rep. No. 608, *supra*, at 18 ("The exceptions are those provided in the Convention."). The Senate bill, by contrast, provided only that the Attorney General would not deport any alien facing persecution "unless deportation or return would be permitted under the terms of the United Nations Protocol Relating to the Status of Refugees." S. 643, 96th Cong., 1st Sess. § 203(e) (1979). The Senate bill thus would have left it to the Attorney General to discern what exceptions to withholding of deportation are called for under the Protocol (and therefore under the Convention) itself, giving whatever weight she deemed appropriate to the views of the UNHCR and conducting whatever balancing (if any) she believed was appropriate under the Convention.

In conference, the House of Representatives' version prevailed. S. Conf. Rep. No. 590, *supra*, at 20. Thus, after specific consideration of the alternative of incorporating the provisions of the Convention directly into United States law, Congress instead enacted a version of Section 1253(h) that struck, in mandatory legislative terms, what it considered to be the appropriate balance between the risk of persecution and the seriousness of a criminal offense.[13]

[13] In the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, Tit. IV-B, § 413(f), 110 Stat. 1269,

In sum, the court of appeals erred in mandating that the seriousness of respondent's crimes be discounted by the severity of the persecution he allegedly faces. That factor derives not from the text or legislative history of the governing Act of Congress, or even from the text of the Convention, but solely from a non-contemporaneous and non-binding document concerning implementation of the Convention authored by a source external to the United States Government.

Congress temporarily instituted a scheme under which the Attorney General had the authority independently to conform withholding provisions to the Protocol. Section 413(f) of that Act provided that the mandate for withholding of deportation shall apply to an alien, notwithstanding any other provision of law, "if the Attorney General determines, in the discretion of the Attorney General," that (A) such alien faces a clear probability of persecution in the country to which the alien would be deported, and (B) withholding of deportation "is necessary to ensure compliance with the 1967 United Nations Protocol Relating to the Status of Refugees." 110 Stat. 1269. That amendment, however, does not govern the present case. It took effect as of the date of enactment (April 24, 1996) and applied "to applications filed before, on, or after such date if final action has not been taken on them before such date." AEDPA § 413(g), 110 Stat. 1269-1270. The Board of Immigration Appeals rendered its decision, and thus took "final action" on respondent's application, on March 5, 1996 (Pet. App. 12a). In any event, AEDPA gave the Attorney General discretion to conform the withholding prohibitions to the Protocol, not to the UNHCR *Handbook*. Furthermore, the legislative history of Section 413(f) indicates that it was designed not to alter the scope of the serious nonpolitical crime exception, but to afford the Attorney General discretion in assessing whether aggravated felonies constitute "particularly serious" crimes within the meaning of Section 1253(h)(2)(B). See *Choeum* v. *INS*, 129 F.3d 29, 42-43 (1st Cir. 1997); accord 8 C.F.R. 208.16(c)(3) (1998).

C. The Board Reasonably Concluded That Respondent's Offenses Constituted Serious Nonpolitical Crimes Even Though They Were Not "Atrocious" In Character

The Ninth Circuit further erred in requiring the Attorney General to consider whether respondent's criminal activities involved "acts of an atrocious nature," of the sort described in that court's *McMullen* opinion (Pet. App. 6a), before concluding that they were serious nonpolitical crimes. While the Attorney General certainly considers atrocious crimes to fall within Section 1253(h)(2)(C)'s exception to mandatory withholding of deportation, she has also concluded that an offense "should be considered a serious nonpolitical crime if the act is disproportionate to the objective." See *Deportation Proceedings for Joseph Patrick Thomas Doherty*, 13 Opin. Off. Legal Counsel at 23 (quoting *McMullen* v. *INS*, 788 F.2d at 595). The Board thus "consider[s] it important that the political aspect of the offense outweigh its common-law character." Pet. App. 17a. As a result, a crime will not, for example, be deemed political if it "is grossly out of proportion to the political objective." *Ibid.*

1. The Attorney General's interpretation of "serious nonpolitical crime" to include disproportionately criminal offenses, as well as atrocities, is consistent with the statute's language and structure. "Serious" generally signifies actions that "cause considerable distress, anxiety, or inconvenience." *Webster's Third New Int'l Dictionary* 2073 (1986); see also *Webster's II New Riverside Univ. Dictionary* 1065 (1994) ("[g]rave in quality, character or manner * * * [i]nvolving important rather than trivial matters"). "Atrocious," on the other hand, captures only a narrow subset of serious crimes, those that are "marked by or given to extreme wickedness * * * [or] extreme brutality or cruelty: grossly

inhumane." *Webster's Third New Int'l Dictionary*, *supra*, at 139; see also *Webster's II*, *supra*, at 135 ("[e]xtremely evil or cruel: monstrous"). By focusing on the relative level of criminality, violence, and disorder occasioned by an individual's criminal activity, and its proportionality to the claimed objective, the Attorney General's interpretation gives the phrase "serious nonpolitical crime" its full meaning. Thus, unlike the court of appeals, the Attorney General has reasonably recognized that "serious nonpolitical crime" embraces a spectrum of conduct, and not simply humanity's nadir.

2. The Attorney General's interpretation is also consistent with the structure of Section 1253(h)(2). See *Smith* v. *United States*, 508 U.S. 223, 229 (1993) ("Language, of course, cannot be interpreted apart from context."). Subsection (h)(2)(B) of Section 1253 separately precludes any alien who has been convicted of a "particularly serious crime" from obtaining mandatory withholding relief. The Section then instructs that "an aggravated felony shall be considered to" be a "particularly serious crime." 8 U.S.C. 1253(h)(2). "Aggravated felony" is broadly defined to include illicit trafficking in firearms, money laundering, and certain controlled substance and theft offenses. 8 U.S.C. 1101(a)(43)(B), (C), (D) and (G). Common sense dictates that Congress intended the phrase "particularly serious crime" in Subsection (h)(2)(B) to embrace criminal conduct of a more weighty and grave magnitude than the "serious" nonpolitical crimes addressed by Subsection (h)(2)(C). See generally *United States* v. *Granderson*, 511 U.S. 39, 42 (1994) (statute should be accorded "a sensible construction"). Otherwise the word "particularly" would have no independent significance. See generally *Bailey* v. *United States*, 516 U.S. 137, 145 (1995) ("[A] legislature is presumed to have used no superfluous words.")

(internal quotation marks omitted). Because Congress has directed that an aggravated felony satisfies the definition of "particularly serious crime," it surely is reasonable for the Attorney General to adopt a construction of "serious" crime that does not categorically require that same level of criminality, much less that the criminal activity be "atrocious" in nature. The court of appeals' focus on atrocity, by contrast, results in an upside-down statutory construct under which "serious" crimes must register as more depraved and violent than "particularly serious crimes."

3. In effectively equating "serious nonpolitical crime[s]" with atrocities, the court of appeals not only departed from the INA's plain text, but also artificially truncated the Attorney General's ability to factor other, significant judgments into the "serious nonpolitical crime" calculus. As relevant to this case, the Attorney General has determined that criminal violence targeted solely or primarily at innocent civilians will often be disproportionate to any reasonable political objective. See *Deportation Proceedings of Joseph Doherty*, 12 Opin. Off. Legal Counsel 1, 8 n.9 (1988) ("[I]t is the policy of the United States to condemn acts of violence directed against non-combatants even by those who are otherwise legitimately seeking to oppose a non-democratic government."); *Deportation Proceedings for Joseph Doherty*, 13 Opin. Off. Legal Counsel at 24; *McMullen*, 19 I. & N. Dec. at 98-99. "The distinction between acts against ordinary civilians and official instrumentalities has been extant in the common law since *In re Meunier*, 2 Q.B. 415 (1894)." *McMullen* v. *INS*, 788 F.2d at 597. Both this Court and the courts of appeals have recognized that violence against helpless civilians falls beyond the legitimate boundaries of political activity. See *Ornelas* v. *Ruiz*, 161 U.S. 502, 510-511

(1896) (where "private citizens were also violently assaulted; horses belonging to them taken; houses burned; small sums of money extorted from women; clothes, provisions, and goods appropriated; and three citizens kidnapped," the State Department reasonably concluded that the actions were not political for purposes of an exception to extradition); *McMullen* v. *INS*, 788 F.2d at 598 (refusing to deem "acts of violence directed at ordinary citizens" to be "political crimes" within the meaning of 8 U.S.C. 1253(h)(2)(C)); *Eain* v. *Wilkes*, 641 F.2d 504, 521-523 (7th Cir.) (bombing campaign directed at a civilian population cannot be considered a political offense for extradition purposes), cert. denied, 454 U.S. 894 (1981).

The Attorney General's judgment regarding the inherent gravity of violence against civilians, moreover, is consonant with general principles of international law, which clearly confirm that civilians should not be the intentional targets of attacks by government or anti-government forces. See, *e.g.*, Protocol I Additional to the Geneva Conventions of 12 August, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 51(2), 16 I.L.M. 1391, 1413 ("The civilian population as such, as well as individual civilians, shall not be the object of attack."); *id.* art. 48, 16 I.L.M. at 1412 ("In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the [self-determination] conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."); Protocol II Additional to the Geneva Conventions of 12 August, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977,

arts. 4, 13, 16 I.L.M. 1442, 1444, 1447;[14] Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, arts. 1, 4, 8, *reprinted in* 24 U.S.T. 565, 568, 569, 571; UNHCR *Handbook* ¶ 158 (suggesting that hijacking of aircraft and its crew, "under threat of arms or with actual violence," will be "difficult" to overlook under the serious nonpolitical crime exception).[15]

A further defect in the court of appeals' restrictive view of a "serious nonpolitical crime" is thus that it effectively bars the Attorney General from giving significant weight not only to the nature and severity of the crime, but also to the identity of the victim. Because case law dating from the 19th century and established international norms alike recognize that organized violence against innocent civilians is not protected political conduct, the Attorney General and the Board have reasonably construed Section 1253(h)(2)(C) in a manner that ensures that the special humanitarian relief of withholding of deportation does not reward the

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[14] Although both Protocols I and II have been signed by the United States, at this time only Protocol II has been transmitted to the Senate for its advice and consent to ratification by the President. See S. Treaty Doc. No. 2, 100th Cong., 1st Sess. iv (1987). The United States accepts the principle that civilians and civilian property per se may not be the intentional object of attack in armed conflict.

[15] See generally Geneva Convention Relative to the Protection of Civilian Persons in Time Of War, Aug. 12, 1949, 75 U.N.T.S. 287, *reprinted in* 6 U.S.T. 3516 (this Convention entered into force for the United States on Feb. 2, 1956); D. Costello, *International Terrorism and the Development of the Principle Aut Dedere Aut Judicare*, 10 J. Int'l L. & Econ. 483, 501 (1975) ("'[T]he legitimacy of a cause does not in itself legitimize the use of certain forms of violence especially against the innocent.'") (quoting study by the United Nations Secretariat).

perpetrators of such violence. See also Pet. App. 11a (Kleinfeld, J., dissenting) ("The United States should be a haven for innocent people fleeing persecution. It should not be a haven for thugs.").

D. The Board Reasonably Concluded That Respondent's Offenses Were Serious Nonpolitical Crimes Based On Their Nature And Character, Not Their Perceived Necessity Or Success

In determining whether respondent's acts of arson, assault and battery, and vandalism constituted serious nonpolitical crimes, the Board focused on the nature and character of respondent's behavior and the correlation between respondent's conduct and his proclaimed political objectives. Pet. App. 18a. The court of appeals held (*id.* at 5a-6a) that, in addition, "[t]he Board should have considered the political necessity and success of [respondent's] methods." Injecting those new elements into the "serious nonpolitical crime" inquiry was error.

First, those factors make no appearance in the statutory text. They do not inhere in the ordinary meaning of the terms "serious" and "nonpolitical," which suggest no more than a requirement that there be an evaluation of the potential or actual damage wrought by the crime and its effect on the victims, and the crime's nexus to the achievement of a political end. Indeed, the court of appeals employed the concepts of necessity and success not to discern the character of respondent's crimes, but rather to excuse the violence after the fact. See Pet. App. 5a ("When you are dealing with an ass it may be necessary to move the beast by a blow on a sensitive part even though what you want to move are the feet.").

Second, the necessity and success factors make no appearance in the legislative history of the Refugee Act or in the text of the Protocol or Convention, or even in

the UNHCR *Handbook*. Nor did the court of appeals cite any other authority to support its ruling. See Pet. App. 5a-6a. The mere fact that the perceived necessity and success of violence directed at innocent civilians and private property might strike a reviewing court as germane does not warrant displacing the interpretation of "serious nonpolitical crime" adopted by the Attorney General under authority of Congress's express assignment of interpretative responsibility. See *Rios-Pineda*, 471 U.S. at 451 ("The Act commits the definition of the standards in the [Immigration and Nationality] Act to the Attorney General and [her] delegate in the first instance, and their construction and application of th[ese] standard[s] should not be overturned by a reviewing court simply because it may prefer another interpretation of the statute.") (internal quotation marks omitted).

Third, strong policy reasons counsel against a rule compelling the Attorney General to give weight to the perceived necessity and success of violence in these circumstances. In the first place, an announcement by officials of the United States Government that criminal violence against civilians is "necessary" in a particular country could incite further violence and could have extremely sensitive foreign policy and diplomatic implications. The Attorney General may thus reasonably elect to forgo injecting such an element into the withholding analysis under United States law.[16]

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[16] Conversely, to require a showing of necessity could impair the ability of genuine political refugees to qualify for withholding. Where the character of the alien's conduct is not serious and yet unquestionably political (*e.g.*, trespass by sitting in at a segregated lunch counter; striking by farm laborers; engaging in prohibited religious exercise), it is reasonable for the Attorney General not to require the alien also to prove that no alternative means of protest

Further, the Board could reasonably conclude, based on established domestic and international norms, that violence aimed at unarmed and helpless civilians will presumptively constitute a serious and nonpolitical crime despite the alien's own perception that it was necessary. Such actions seek in the first place only general social disorder and misery; the change or downfall of the government is at best "intended only as an indirect result." *McMullen* v. *INS*, 788 F.2d at 597; see also *Eain*, 641 F.2d at 519 (terror tactics aimed at civilians "seek[] to promote social chaos"). It is well within the Attorney General's "considerable discretion," *Stevic*, 467 U.S. at 429 n.22, to conclude that violent crime targeting civilians is too tangential and remote a means of effecting political change to discount the otherwise serious and nonpolitical nature of an offense.[17]

(such as a march) were available and thus that the unlawful conduct was "necessary."

[17] Even if the Attorney General were to decide that necessity should be a relevant consideration, the court of appeals' conclusion that arson, beatings, and vandalism directed at civilians were necessary to effect governmental change during the relevant time in Guatemala misunderstands the record and reality. As the State Department reported to the immigration judge, Guatemala has enjoyed peaceful transfers of power between governments since 1986. AR 116. Furthermore, shortly after respondent left Guatemala, an attempt by the then Guatemalan President to suspend constitutional rule was quelled, and the President ousted, by purely peaceful protests. See *Serrano out, de Leon Carpio in*, Latin American Weekly Report, June 17, 1993, at 267; F. Villagran de Leon, *Thwarting the Guatemalan Coup*, 4 Journal of Democracy 117 (Oct. 1993). If peaceful resistance was a sufficiently potent protest vehicle to bring down a government, it is difficult to conceive why beating and stoning bus passengers were "necessary" simply to have bus fares lowered or crimes investigated.

"Success," which the court of appeals defined simply as "draw[ing] the government's attention to your protest; your political objective is a governmental response" (Pet. App. 5a), is also a problematic consideration. Attracting the attention of the government might often weigh strongly in favor of—not against—the conclusion that a crime was "serious." The government is rarely waylaid by petty infractions. See Pet. App. 18a (respondent's crimes were "*violent enough* to attract the attention of the main combatants in the Guatemalan conflict") (emphasis added). Success in attracting governmental attention, moreover, may do little to distinguish political from nonpolitical offenses. Narcoterrorists, street gangs, and serial killers all receive attention from and provoke reactions by the government. The government's response, however, cannot by itself retroactively invest the crime with a political content that was lacking at the time of commission. Finally, the court of appeals paid scant heed to the Attorney General's policy judgment that violence against innocent civilians, however successful in accomplishing its supposed political objectives, may militate strongly in favor of concluding that a serious nonpolitical crime has been committed.

E. Substantial Evidence Supported The Board's Determination That Respondent's Violence Constituted Serious Nonpolitical Crimes

Even as to those aspects of the Board's approach in this case with which it agreed, the court of appeals concluded that the Board erred in applying them to respondent's case. Pet. App. 4a-6a. The question whether there are "serious reasons for considering" that a particular offense qualifies as serious and nonpolitical, however, is largely factual. See *Ornelas*, 161 U.S. at 509 (whether a crime is a political offense is

chiefly a question of fact). The Board's resolution of those factual issues must be sustained by the court of appeals if supported by substantial evidence. 8 U.S.C. 1105a(a)(4) (factual findings made by the Board are to be reviewed for substantial evidence); see also *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481, 483-484 (1992). Once respondent admitted his criminal activities, moreover, the burden of proof fell on him to show that his offenses were not serious and were political in character. See 8 C.F.R. 208.16(c)(2) (1998); 8 C.F.R. 208.16(c)(3) (1995). Before a court of appeals may set aside a Board decision, the alien must show that the evidence he presented "was so compelling that no reasonable factfinder could fail to find" that he was eligible for relief. *Elias-Zacarias*, 502 U.S. at 483-484; see also *id.* at 481 n.1 ("To reverse the [Board's] finding we must find that the evidence not only *supports* [the contrary] conclusion, but *compels* it.").

Based on the record before the Board, there plainly was substantial evidence to support its determination that respondent's acts of arson, assault and battery, and vandalism against innocent civilians and their property constituted serious nonpolitical crimes. Respondent testified that, on numerous occasions, he would stone, beat with sticks, and bind innocent civilians if they did not abandon the buses promptly at his command. Pet. App. 8a-9a; J.A. 47-48. He also confessed to burning the buses and vandalizing and destroying the inventory of local shopkeepers. Pet. App. 9a-10a; J.A. 49. Respondent's own admissions unquestionably amount to substantial evidence of his crimes. Cf. *Motes* v. *United States*, 178 U.S. 458, 475-476 (1900) (testimonial admission to criminal conduct is sufficient by itself to sustain a guilty verdict).

Nor can it reasonably be disputed that respondent's repeated burning of buses (arson), beating with sticks and stoning of passengers (assault with dangerous weapons), and destruction of private property constitute "serious" crimes. They are, to the contrary, the very types of crimes that the Convention contemplated as "serious." *McMullen* v. *INS*, 788 F.2d at 597; P. Weis, *supra*, at 342 (arson); 1 A. Grahl-Madsen, *The Status of Refugees in International Law* 294 (1966) (arson); *The Refugee in International Law*, *supra*, at 62 (arson). Indeed, "there are serious reasons for considering," 8 U.S.C. 1253(h)(2)(C), on the basis of the present record, that respondent's acts of arson and assault with a dangerous weapon would qualify as aggravated felonies. See 18 U.S.C. 16, 33, 81, 113; 8 U.S.C. 1101(a)(43). Congress intended for that very conduct, if the subject of a conviction, to constitute "particularly serious crime[s]" that would disqualify the perpetrator from withholding under 8 U.S.C. 1253(h)(2)(B). It should follow *a fortiori* that the crimes are "serious" within the meaning of Section 1253(h)(2)(C) as well.

The court of appeals (Pet. App. 4a) was unjustified in characterizing respondent's offenses as mere "crimes against property" and "minor assaults and batteries." As the dissent noted:

> Beating people with sticks and stoning them, does not seem "minor" to me. Hitting someone on the head with a stick in the nature of a baseball bat or a stone in the nature of a brick is reasonably likely to cause brain damage. It is hard to imagine a band of masked young men, angry enough to burn buses, being especially gentle and kind as they stone people, hit them with "sticks," and tie them up. * * * The bus passengers, perhaps travelling to

> work or going home exhausted at the end of hard days, probably would not interrupt their journeys for a bunch of angry boys with little sticks.

Pet. App. 10a-11a. Nor is it reasonable to assume that "minor" assaults and petty property crimes would have, as respondent claims and the court of appeals found, attracted the attention of government officials and "earn[ed] the enmity of a rival rebel group, 'the guerrillas.'" *Id.* at 5a.[18] In any event, it was respondent's burden to prove that his assaults and arson were minor; his claims that his conduct inspired death threats and governmental and guerrilla attention undercut any such theory.

The record also amply supports the Board's determination that respondent's crimes were nonpolitical. Respondent's primary concern about increased bus fares could reasonably be regarded as more economic than political, notwithstanding the court of appeals' assertion that respondent had "no personal motivation or gain." Pet. App. 5a. Even assuming that his occasional references to student disappearances as the impetus for his conduct would be sufficient to invest his

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[18] Respondent's description of his activities of forcibly removing passengers from the bus and beating them with stones and sticks is reminiscent of the beating of truck driver Reginald Denny during the Los Angeles riots in May 1992—a brutal assault that no reasonable person could characterize as anything but "serious." See R. W. Stevenson, *Riots in Los Angeles: Moment of Terror; Blacks Beat White Truck Driver as TV Cameras Record the Scene*, New York Times, May 1, 1992, at A21 ("Mr. Denny * * * was yanked from the cab of his truck by a band of black men and beaten * * *. [S]everal men could be seen approaching him, throwing stones or bottles."); see also *New Assault Charges Filed Against 3 in Riot*, New York Times, May 29, 1992, at A13 (37 felony charges filed against perpetrators of Denny beating).

crimes with a political component, his crimes were disproportionate and bore only a remote nexus to his claimed political objectives. In the view of the Attorney General and the Board, the wanton victimization of defenseless civilians plays a vital role in determining whether a crime is disproportionate to the achievement of any legitimate political objective. Respondent's venting of his political anger on innocent and helpless civilians, moreover, would at most have accomplished general social unrest and disorder. Its capacity to motivate the government either to lower bus fares or to investigate student disappearances was remote, especially if, as respondent and the court of appeals believed (Pet. App. 5a), the Guatemalan government cared little for the well-being of its citizens. Why the buses had to be burned during the day when filled with civilians, rather than when empty at night or off duty, is left unexplained, unless terrorizing civilians was one of respondent's primary objectives. Nor is there any obvious logical, direct connection between beating civilians, burning what were apparently privately owned buses, and looting privately owned stores, on the one hand, and prompting governmental investigations of student disappearances on the other.

In short, because respondent's ire "manifested itself disproportionately in the destruction of [private] property and assaults on civilians," Pet. App. 18a, the Board reasonably concluded that there was not a sufficiently direct causal link between the criminal acts respondent inflicted on ordinary, uninvolved civilians and his opposition to the government and its official instrumentalities. Thus, the Board's conclusion that respondent is ineligible for withholding of deportation because there are "serious reasons for considering" that

he "committed a serious nonpolitical crime" in Guatemala should have been sustained.[19]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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[19] In addition to reversing and remanding the Board's determination that respondent was ineligible for withholding of deportation, the court of appeals vacated and remanded the Board's discretionary denial of asylum on the ground that reconsideration of respondent's activities in light of the court's decision on the withholding of deportation issue could alter the Board's exercise of its discretion to deny asylum as well. Pet. App. 7a. If this Court reverses the court of appeals' holding on the withholding of deportation issue, the sole basis for the court of appeals' asylum ruling will necessarily be eliminated as well. Furthermore, this Court repeatedly has confirmed that the Attorney General may deny asylum purely on discretionary grounds, without reference to the alien's statutory eligibility for non-discretionary forms of relief. See *INS* v. *Doherty*, 502 U.S. 314, 323 (1992); *Abudu*, 485 U.S. at 105.

APPENDIX

PROVISIONS GOVERNING WITHHOLDING OF DEPORTATION AND REMOVAL

8 U.S.C. 1253(h) (1994), which governs the present case, provided:

Withholding of deportation or return

(1) The Attorney General shall not deport or return any alien (other than an alien described in section 1251(a)(4)(D) of this title) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

(2) Paragraph (1) shall not apply to any alien if the Attorney General determines that—

(A) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

(B) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

(C) there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States; or

(D) there are reasonable grounds for regarding the alien as a danger to the security of the United States.

For purposes of subparagraph (B), an alien who has been convicted of an aggravated felony shall be considered to have committed a particularly serious crime.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, Tit. IV-B, § 413(f), 110 Stat. 1269, amended 8 U.S.C. 1253(h) to read (language added by the amendment is italicized):

Withholding of deportation or return

(1) The Attorney General shall not deport or return any alien (other than an alien described in section 1251(a)(4)(D) of this title) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

(2) Paragraph (1) shall not apply to any alien if the Attorney General determines that—

(A) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

(B) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

(C) there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States; or

(D) there are reasonable grounds for regarding the alien as a danger to the security of the United States.

For purposes of subparagraph (B), an alien who has been convicted of an aggravated felony shall be considered to have committed a particularly serious

crime. *For purposes of subparagraph (D), an alien who is described in section 241(a)(4)(B) of this title shall be considered to be an alien for whom there are reasonable grounds for regarding as a danger to the security of the United States.*

(3) Notwithstanding any other provision of law, paragraph (1) shall apply to any alien if the Attorney General determines, in the discretion of the Attorney General, that—

(A) such alien's life or freedom would be threatened, in the country to which such alien would be deported or returned, on account of race, religion, nationality, membership in a particular social group, or political opinion; and

(B) the application of paragraph (1) to such alien is necessary to ensure compliance with the 1967 United Nations Protocol Relating to the Status of Refugees.

* * * * *

[This amendment became effective on April 24, 1996 and "appl[ies] to applications filed before, on, or after such date if final action has not been taken on them before such date." See AEDPA, Tit. IV-B, § 413(g), 110 Stat. 1269-1270.]

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Tit. III-A, Div. C, § 305, 110 Stat. 3009-602 (Sept. 30, 1996), revised and rewrote 8 U.S.C. 1253(h) in its entirety. The provision relating to withholding of deportation is now codified, as amended, at 8 U.S.C. 1231(b)(3) (Supp. II 1996), and it provides, in relevant part:

(b) Countries to which aliens may be removed

* * *

(3) Restriction on removal to a country where alien's life or freedom would be threatened—

(A) In general.

Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

(B) Exception.

Subparagraph (A) does not apply to an alien deportable under section 1227(a)(4)(D) of this title or if the Attorney General decides that—

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion;

(ii) the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States;

(iii) there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States; or

(iv) there are reasonable grounds to believe that the alien is a danger to the security of the United States.

For purposes of clause (ii), an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime. For purposes of clause (iv), an alien who is described in section 1227(a)(4)(B) of this title shall be considered to be an alien with respect to whom there are reasonable grounds for regarding as a danger to the security of the United States.

* * * * *

[This amendment applies to aliens who were placed in proceedings on or after April 1, 1997. IIRIRA, Tit. III-A, § 309(a) & (c), 110 Stat. 3009-625.]

PROVISIONS GOVERNING ASYLUM

8 U.S.C. 1158(a) (1994), which governs the present case, provided:

Establishment by Attorney General; coverage

The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

AEDPA, Tit. IV-C, § 421(a), 110 Stat. 1270, amended 8 U.S.C. 1158 to read (language added by the amendment is italicized):

(a) Establishment by Attorney General; coverage

The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title. *The Attorney General may not grant an alien asylum if the Attorney General determines that the alien is excludable under subclause (I), (II), or (III) of section 212(a)(3)(B)(i) or deportable under section 241(a)(4)(B), unless the Attorney General determines, in the discretion of the Attorney General, that there are not reasonable grounds for regarding the alien as a danger to the security of the United States.*

* * * * *

[This amendment became effective on April 24, 1996, and applies to "asylum determinations made on or after such date." AEDPA, Tit. VI-C, § 421(b), 110 Stat. 1270.]

IIRIRA, Tit. VI-A, § 604, 110 Stat. 3009-691 to 3009-692, revised and rewrote 8 U.S.C. 1158 in its entirety. The provision relating to asylum is now codified, as amended, at 8 U.S.C. 1158(b) (Supp. II 1996), and it provides, in relevant part:

(b) Conditions for granting asylum

(1) In general.

The Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Attorney General under this section if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

(2) Exceptions

(A) In general.

Paragraph (1) shall not apply to an alien if the Attorney General determines that—

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

(ii) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

(iii) there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States;

(iv) there are reasonable grounds for regarding the alien as a danger to the security of the United States;

(v) the alien is inadmissible under subclause (I), (II), (III), or (IV) of section 1182(a)(3)(B)(i) of this title or removable under section 1227(a)(4)(B) of this title (relating to terrorist activity), unless, in the case only of an alien inadmissible under subclause (IV) of section 1182(a)(3)(B)(i) of this title, the Attorney General determines, in the Attorney General's discretion, that there are not reasonable grounds for regarding the alien as a danger to the security of the United States; or

(vi) the alien was firmly resettled in another country prior to arriving in the United States.

(B) Special rules—

(i) Conviction of aggravated felony

For purposes of clause (ii) of subparagraph (A), an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime.

(ii) Offenses

The Attorney General may designate by regulation offenses that will be considered to be a crime described in clause (ii) or (iii) of subparagraph (A).

(C) Additional limitations

The Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under paragraph (1).

(D) No judicial review

There shall be no judicial review of a determination of the Attorney General under subparagraph (A)(v).

* * * * *

[This amendment applies to applications for asylum filed on or after April 1, 1997. See IIRIRA, Tit. VI-A, § 604(c), 110 Stat. 3009-694.]

8 U.S.C. 1101(a)(43) (1994) provides:

The term "aggravated felony" means—

(A) murder;

(B) illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18);

(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of title 18) or in explosive materials (as defined in section 841(c) of that title);

(D) an offense described in section 1956 of title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $100,000;

(E) an offense described in—

(i) section 842(h) or (i) of title 18, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

(ii) section 922(g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924(b) or (h) of title 18 (relating to firearms offenses); or

(iii) section 5861 of title 26 (relating to firearms offenses);

(F) a crime of violence as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment imposed (regardless of any suspension of imprisonment) is at least 5 years;

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of

imprisonment imposed (regardless of any suspension of such imprisonment) is at least 5 years;

(H) an offense described in section 875, 876, 877, or 1202 of title 18 (relating to the demand for or receipt of ransom);

(I) an offense described in section 2251, 2251A, or 2252 of title 18 (relating to child pornography);

(J) an offense described in section 1962 of title 18 (relating to racketeer influenced corrupt organizations) for which a sentence of 5 years' imprisonment or more may be imposed;

(K) an offense that—

(i) relates to the owning, controlling, managing, or supervising of a prostitution business; or

(ii) is described in section 1581, 1582, 1583, 1584, 1585, or 1588,[1] of title 18 (relating to peonage, slavery, and involuntary servitude);

(L) an offense described in —

(i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of title 18; or

(ii) section 421 of title 50 (relating to protecting the identity of undercover intelligence agents);

(M) an offense that—

(i) involves fraud or deceit in which the loss to the victim or victims exceeds $200,000; or

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[1] So in original. The comma probably should not appear.

(ii) is described in section 7201 of title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $200,000;

(N) an offense described in section 1324(a)(1)[2] of this title (relating to alien smuggling) for the purpose of commercial advantage;

(O) an offense described in section 1546(a) of title 18 (relating to document fraud) which constitutes trafficking in the documents described in such section for which the term of imprisonment imposed (regardless of any suspicion[3] of such imprisonment) is at least 5 years;

(P) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 15 years or more; and

(Q) an attempt or conspiracy to commit an offense described in this paragraph.

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years.

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[2] See Codification note below.

[3] So in original. Probably should be "suspension".

MULTILATERAL

Protocol Relating to the Status of Refugees

Done at New York January 31, 1967;
Accession advised by the Senate of the United States of America, subject to certain reservations, October 4, 1968;
Accession approved by the President of the United States of America, subject to said reservations, October 15, 1968;
Accession of the United States of America deposited with the Secretary-General of the United Nations, with the said reservations, November 1, 1968;
Proclaimed by the President of the United States of America November 6, 1968;
Entered into force with respect to the United States of America November 1, 1968.
And text of Convention relating to the status of refugees Done at Geneva July 28, 1951.

BY THE PRESIDENT OF THE
UNITED STATES OF AMERICA

A PROCLAMATION

WHEREAS the Protocol Relating to the Status of Refugees was opened for accession at New York on January 31, 1967, the certified text of which in the English, French, Chinese, Russian, and Spanish languages is word for word as follows:

[19 U.S.T. 6224 — 6258]

PROTOCOL RELATING

TO THE STATUS

OF REFUGEES

[Seal omitted]

UNITED NATIONS

1967

T I A S 6577

PROTOCOL RELATING TO THE STATUS OF REFUGEES

The States Parties to the present Protocol,

Considering that the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 (hereinafter referred to as the Convention) covers only those persons who have become refugees as a result of events occurring before 1 January 1951,

Considering that new refugee situations have arisen since the Convention was adopted and that the refugees concerned may therefore not fall within the scope of the Convention,

Considering that it is desirable that equal status should be enjoyed by all refugees covered by the definition in the Convention irrespective of the dateline 1 January 1951,

Have agreed as follows:

Article I

GENERAL PROVISION

1. The States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined.

2. For the purpose of the present Protocol, the term refugee shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article 1 of the Convention as if the words

"As a result of events occurring before 1 January 1951 and..." and the words "... as a result of such events", in article 1 A (2) were omitted.

3. The present Protocol shall be applied by the States Parties hereto without any geographic limitation, save that existing declarations made by States already Parties to the Convention in accordance with article 1 B (1) (a) of the Convention, shall, unless extended under article 1 B (2) thereof, apply also under the present Protocol.

Article II

CO-OPERATION OF THE NATIONAL AUTHORITIES WITH THE UNITED NATIONS

1. The States Parties to the present Protocol undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the present Protocol.

2. In order to enable the Office of the High Commissioner, or any other agency of the United Nations which may succeed it, to make reports to the competent organs of the United Nations, the States Parties to the present Protocol undertake to provide them with the information and statistical data requested, in the appropriate form, concerning:

(a) The condition of refugees;

(b) The implementation of the present Protocol;

(c) Laws, regulations and decrees which are, or may hereafter be, in force relating to refugees.

Article III

INFORMATION ON NATIONAL LEGISLATION

The States Parties to the present Protocol shall communicate to the Secretary-General of the United Nations the laws and regulations which they may adopt to ensure the application of the present Protocol.

Article IV

SETTLEMENT OF DISPUTES

Any dispute between States Parties to the present Protocol which relates to its interpretation or application and which cannot be settled by other means shall be referred to the International Court of Justice at the request of any one of the parties to the dispute.

Article V

ACCESSION

The present Protocol shall be open for accession on behalf of all States Parties to the Convention and of any other State Member of the United Nations or member of any of the specialized agencies or to which an invitation to accede may have been addressed by the General Assembly of the United Nations. Accession shall be effected by the deposit of an instrument of

accession with the Secretary-General of the United Nations.

Article VI

FEDERAL CLAUSE

In the case of a Federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of the Convention to be applied in accordance with article I, paragraph 1, of the present Protocol that come within the legislative jurisdiction of the federal legislative authority, the obligations of the Federal Government shall to this extent be the same as those of States Parties which are not Federal States;

(b) With respect to those articles of the Convention to be applied in accordance with article I, paragraph 1, of the present Protocol that come within the legislative jurisdiction of constituent States, provinces or cantons which are not, under the constitutional system of the federation, bound to take legislative action, the Federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of States, provinces or cantons at the earliest possible moment;

(c) A Federal State Party to the present Protocol shall, at the request of any other State Party hereto transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the Federation and its constituent units in regard to any particular provision of the Convention to be applied in accordance with article I, paragraph 1, of

the present Protocol, showing the extent to which effect has been given to that provision by legislative or other action.

Article VII

RESERVATIONS AND DECLARATIONS

1. At the time of accession, any State may make reservations in respect of article IV of the present Protocol and in respect of the application in accordance with article I of the present Protocol of any provisions of the Convention other than those contained in articles 1, 3, 4, 16 (1) and 33 thereof, provided that in the case of a State Party to the Convention reservations made under this article shall not extend to refugees in respect of whom the Convention applies.

2. Reservations made by States Parties to the Convention in accordance with article 42 thereof shall, unless withdrawn, be applicable in relation to their obligations under the present Protocol.

3. Any State making a reservation in accordance with paragraph 1 of this article may at any time withdraw such reservation by a communication to that effect addressed to the Secretary-General of the United Nations.

4. Declaration made under article 40, paragraphs 1 and 2, of the Convention by a State Party thereto which accedes to the present Protocol shall be deemed to apply in respect of the present Protocol, unless upon accession a notification to the contrary is addressed by the State Party concerned to the Secretary-General of

the United Nations. The provisions of article 40, paragraphs 2 and 3, and of article 44, paragraph 3, of the Convention shall be deemed to apply mutatis mutandis to the present Protocol.

Article VIII

ENTRY INTO FORCE

1. The present Protocol shall come into force on the day of deposit of the sixth instrument of accession.

2. For each State acceding to the Protocol after the deposit of the sixth instrument of accession, the Protocol shall come into force on the date of deposit by such State of its instrument of accession.

Article IX

DENUNCIATION

1. Any State Party hereto may denounce this Protocol at any time by a notification addressed to the Secretary-General of the United Nations.

2. Such denunciation shall take effect for the State Party concerned one year from the date on which it is received by the Secretary-General of the United Nations.

Article X

NOTIFICATIONS BY THE SECRETARY-GENERAL OF THE UNITED NATIONS

The Secretary-General of the United Nations shall inform the States referred to in article V above of the date of entry into force, accessions, reservations and withdrawals of reservations to and denunciations of the present Protocol, and of declarations and notifications relating hereto.

Article XI

DEPOSIT IN THE ARCHIVES OF THE SECRETARIAT OF THE UNITED NATIONS

A copy of the present Protocol, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, signed by the President of the General Assembly and by the Secretary-General of the United Nations, shall be deposited in the archives of the Secretariat of the United Nations. The Secretary-General will transmit certified copies thereof to all States Members of the United Nations and to the other States referred to in article V above.

In accordance with article XI of the Protocol, we have appended our signatures this thirty-first day of January one thousand nine hundred and sixty-seven.

A.R. PAZHWAK	U THANT
PRESIDENT OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS	SECRETARY-GENERAL OF THE UNITED NATIONS

I hereby certify that the foregoing text is a true copy of the Protocol relating to the Status of Refugees, done at New York, on 31 January 1967, in a single copy signed by the President of the General Assembly of the United Nations and the Secretary-General of the United Nations, the original of which is deposited with the Secretary-General of the United Nations.

***For the Secretary-General*:**

C A STAVROPOULOS

Under-Secretary
Legal Counsel

United Nations, New York
9 February 1967

[foreign language versions omited]

WHEREAS the Senate of the United States of America by its resolution of October 4, 1968, two- thirds of the Senators present concurring therein, did advise and consent to accession to the Protocol with the following reservations:

> "The United States of America construes Article 29 of the Convention as applying only to refugees who are resident in the United States and reserves the right to tax refugees who are not residents of the United States in accordance with its general rules relating to nonresident aliens."
>
> "The United States of America accepts the obligation of paragraph 1(b) of Article 24 of the Convention except insofar as that paragraph may conflict in certain instances with any provision of title II (old age, survivors and disability insurance) or title XVIII (hospital and medical insurance for the aged) of the Social Security Act. As to any such provision, the United States will accord to refugees lawfully staying in its territory treatment no less favorable than is accorded aliens generally in the same circumstances."

WHEREAS the President of the United States of America, in pursuance of the advice and consent of the Senate, duly approved on October 15, 1968 the accession of the United States of America to the Protocol with the aforesaid reservations;

WHEREAS it is provided in Article VIII that the Protocol shall come into force on the day of deposit of the sixth instrument of accession and shall come into

force for each State acceding thereafter on the date of deposit of its instrument of accession;

AND WHEREAS, pursuant to the provisions of Article VIII, the Protocol first came into force on October 4, 1967, and came into force with respect to the United States of America, subject to the aforesaid reservations, on November 1, 1968, the date of deposit by the United States of America of its instrument of accession;

NOW, THEREFORE, be it known that I, Lyndon B. Johnson, President of the United States of America, do hereby proclaim and make public the Protocol Relating to the Status of Refugees, to the end that the same and every article and clause thereof shall be observed and fulfilled with good faith, on and after November 1, 1968, by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof, subject to the aforesaid reservations.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

[seal] DONE at the city of Washington this sixth day of November in the year of our Lord one thousand nine hundred sixty-eight and of the Independence of the United States of America the one hundred ninety-third.

LYNDON B. JOHNSON

By the President:
DEAN RUSK
Secretary of State

[19 U.S.T. 6259-6282]

UNITED NATIONS CONFERENCE OF PLENIPOTENTIARIES ON THE STATUS OF REFUGEES AND STATELESS PERSONS

CONVENTION RELATING TO THE STATUS OF REFUGEES

[Seal omitted]

[French version omitted]

T I A S 6577

CONVENTION RELATING TO THE STATUS OF REFUGEES

Preamble

The HIGH CONTRACTING PARTIES,

CONSIDERING that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,

CONSIDERING that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms,

CONSIDERING that it is desirable to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and the protection accorded by such instruments by means of a new agreement,

CONSIDERING that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation,

EXPRESSING the wish that all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States,

NOTING that the United Nations High Commissioner for Refugees is charged with the task of supervising international conventions providing for the protection of refugees, and recognizing that the effective co-ordination of measures taken to deal with this problem will depend upon the co-operation of States with the High Commissioner,

HAVE AGREED as follows:

Chapter I

GENERAL PROVISIONS

ARTICLE 1

Definition of the Term "Refugee"

A. For the purposes of the present Convention, the term "refugee" shall apply to any person who:

(1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization;

Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of paragraph 2 of this section;

(2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

B. (1) For the purposes of this Convention, the words "events occurring before 1 January 1951" in article 1, section A, shall be understood to mean either

(a) "events occurring in Europe before 1 January 1951" or

(b) "events occurring in Europe or elsewhere before 1 January 1951";

and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention.

(2) Any Contracting State which has adopted alternative (*a*) may at any time extend its obligations by adopting alternative (*b*) by means of a notification addressed to the Secretary-General of the United Nations.

C. This Convention shall cease to apply to any person falling under the terms of section A if:

(1) He has voluntarily re-availed himself of the protection of the country of his
nationality; or

(2) Having lost his nationality, he has voluntarily reacquired it; or

(3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or

(4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or

(5) He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;

Provided that this paragraph shall not apply to a refugee falling under section A (1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;

(6) Being a person who has no nationality he is, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence;

Provided that this paragraph shall not apply to a refugee falling under section A (1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.

D. This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.

When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall *ipso facto* be entitled to the benefits of this Convention.

E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(*a*) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(*b*) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(*c*) he has been guilty of acts contrary to the purposes and principles of the United Nations.

ARTICLE 2

General Obligations

Every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order.

ARTICLE 3

Non-discrimination

The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.

ARTICLE 4

Religion

The Contracting States shall accord to refugees within their territories treatment at least as favourable as that accorded to their nationals with respect to freedom to practice their religion and freedom as regards the religious education of their children.

ARTICLE 5

Rights granted apart from this Convention

Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention.

ARTICLE 6

The Term "in the same circumstances"

For the purpose of this Convention, the term "in the same circumstances" implies that any requirements (including requirements as to length and conditions of sojourn or residence) which the particular individual would have to fulfil for the enjoyment of the right in question, if he were not a refugee, must be fulfilled by him, with the exception of requirements which by their nature a refugee is incapable of fulfilling.

ARTICLE 7

Exemption from Reciprocity

1. Except where this Convention contains more favourable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally.

2. After a period of three years residence, all refugees shall enjoy exemption from legislative reciprocity in the territory of the Contracting States.

3. Each Contracting State shall continue to accord to refugees the rights and benefits to which they were already entitled, in the absence of reciprocity, at the date of entry into force of this Convention for that State.

4. The Contracting States shall consider favourably the possibility of according to refugees, in the absence of reciprocity, rights and benefits beyond those to which they are entitled according to paragraphs 2 and 3, and to extending exemption from reciprocity to refugees who do not fulfil the conditions provided for in paragraphs 2 and 3.

5. The provisions of paragraphs 2 and 3 apply both to the rights and benefits referred to in articles 13, 18, 19, 21 and 22 of this Convention and to rights and benefits for which this Convention does not provide.

ARTICLE 8

Exemption from Exceptional Measures

With regard to exceptional measures which may be taken against the person, property or interests of nationals of a foreign State, the Contracting States shall not apply such measures to a refugee who is formally a national of the said State solely on account of such nationality. Contracting States which, under their legislation, are prevented from applying the general principle expressed in this article, shall, in appropriate cases, grant exemptions in favor of such refugees.

ARTICLE 9

Provisional Measures

Nothing in this Convention shall prevent a Contracting State, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security.

ARTICLE 10

Continuity of Residence

1. Where a refugee has been forcibly displaced during the Second World War and removed to the territory of a Contracting State, and is resident there,

the period of such enforced sojourn shall be considered to have been lawful residence within that territory.

2. Where a refugee has been forcibly displaced during the Second World War from the territory of a Contracting State and has, prior to the date of entry into force of this Convention, returned there for the purpose of taking up residence, the period of residence before and after such enforced displacement shall be regarded as one uninterrupted period for any purposes for which uninterrupted residence is required.

ARTICLE 11

Refugee Seamen

In the case of refugees regularly serving as crew members on board a ship flying the flag of a Contracting State, that State shall give sympathetic consideration to their establishment on its territory and the issue of travel documents to them or their temporary admission to its territory particularly with a view to facilitating their establishment in another country.

Chapter II

JURIDICAL STATUS

ARTICLE 12

Personal Status

1. The personal status of a refugee shall be governed by the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence.

2. Rights previously acquired by a refugee and dependent on personal status, more particularly rights attaching to marriage, shall be respected by a Contracting State, subject to compliance, if this be necessary, with the formalities required by the law of that State, provided that the right in question is one which would have been recognized by the law of that State had he not become a refugee.

ARTICLE 13

Movable and Immovable Property

The Contracting States shall accord to a refugee treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the acquisition of movable and immovable property and other rights pertaining thereto, and to leases and other contracts relating to movable and immovable property.

ARTICLE 14

Artistic Rights and Industrial Property

In respect of the protection of industrial property, such as inventions, designs or models, trade marks, trade names, and of rights in literary, artistic and scientific works, a refugee shall be accorded in the country in which he has his habitual residence the same protection as is accorded to nationals of that country. In the territory of any other Contracting State, he shall be accorded the same protection as is accorded in that territory to nationals of the country in which he has his habitual residence.

ARTICLE 15

Right of Association

As regards non-political and non-profit-making associations and trade unions the Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country, in the same circumstances.

ARTICLE 16

Access to Courts

1. A refugee shall have free access to the courts of law on the territory of all Contracting States.

2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment

as a national in matters pertaining to access to the Courts, including legal assistance and exemption from *cautio judicatum solvi*.

3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.

Chapter III

GAINFUL EMPLOYMENT

ARTICLE 17

Wage-earning Employment

1. The Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment.

2. In any case, restrictive measures imposed on aliens or the employment of aliens for the protection of the national labour market shall not be applied to a refugee who was already exempt from them at the date of entry into force of this Convention for the Contracting State concerned, or who fulfils one of the following conditions:

(*a*) He has completed three years residence in the country.

(*b*) He has a spouse possessing the nationality of the country of residence. A refugee may not

invoke the benefit of this provision if he has abandoned his spouse;

(*c*) He has one or more children possessing the nationality of the country of residence.

3. The Contracting States shall give sympathetic consideration to assimilating the rights of all refugees with regard to wage-earning employment to those of nationals, and in particular of those refugees who have entered their territory pursuant to programmes of labour recruitment or under immigration schemes.

ARTICLE 18

Self-employment

The Contracting States shall accord to a refugee lawfully in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the right to engage on his own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies.

ARTICLE 19

Liberal Professions

1. Each Contracting State shall accord to refugees lawfully staying in their territory who hold diplomas recognized by the competent authorities of that State, and who are desirous of practising a liberal profession, treatment as favourable as possible and, in any event,

not less favourable than that accorded to aliens generally in the same circumstances.

2. The Contracting States shall use their best endeavours consistently with their laws and constitutions to secure the settlement of such refugees in the territories, other than the metropolitan territory, for whose international relations they are responsible.

Chapter IV

WELFARE

ARTICLE 20

Rationing

Where a rationing system exists, which applies to the population at large and regulates the general distribution of products in short supply, refugees shall be accorded the same treatment as nationals.

ARTICLE 21

Housing

As regards housing, the Contracting States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.

ARTICLE 22

Public Education

1. The Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education.

2. The Contracting States shall accord to refugees treatment as favourable as possible, and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, with respect to education other than elementary education and, in particular, as regards access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships.

ARTICLE 23

Public Relief

The Contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals.

ARTICLE 24

Labour Legislation and Social Security

1. The Contracting States shall accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals in respect of the following matters:

(*a*) In so far as such matters are governed by laws or regulations or are subject to the control of administrative authorities: remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age of employment, apprenticeship and training, women's work and the work of young persons, and the enjoyment of the benefits of collective bargaining;

(*b*) Social security (legal provisions in respect of employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which, according to national laws or regulations, is covered by a social security scheme), subject to the following limitations:

(i) There may be appropriate arrangements for the maintenance of acquired rights and rights in course of acquisition;

(ii) National laws or regulations of the country of residence may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension.

2. The right to compensation for the death of a refugee resulting from employment injury or from occupational disease shall not be affected by the fact that the residence of the beneficiary is outside the territory of the Contracting State.

3. The Contracting States shall extend to refugees the benefits of agreements concluded between them, or which may be concluded between them in the future, concerning the maintenance of acquired rights and rights in the process of acquisition in regard to social security, subject only to the conditions which apply to nationals of the States signatory to the agreements in question.

4. The Contracting States will give sympathetic consideration to extending to refugees so far as possible the benefits of similar agreements which may at any time be in force between such Contracting States and non-contracting States.

Chapter V

ADMINISTRATIVE MEASURES

ARTICLE 25

Administrative Assistance

1. When the exercise of a right by a refugee would normally require the assistance of authorities of a foreign country to whom he cannot have recourse, the Contracting States in whose territory he is residing shall arrange that such assistance be afforded to him by their own authorities or by an international authority.

2. The authority or authorities mentioned in paragraph 1 shall deliver or cause to be delivered under their supervision to refugees such documents or certifications as would normally be delivered to aliens by or through their national authorities.

3. Documents or certifications so delivered shall stand in the stead of the official instruments delivered to aliens by or through their national authorities, and shall be given credence in the absence of proof to the contrary.

4. Subject to such exceptional treatment as may be granted to indigent persons, fees may be charged for the services mentioned herein, but such fees shall be moderate and commensurate with those charged to nationals for similar services.

5. The provisions of this article shall be without prejudice to articles 27 and 28.

ARTICLE 26

Freedom of Movement

Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances.

ARTICLE 27

Identity Papers

The Contracting States shall issue identity papers to any refugee in their territory who does not possess a valid travel document.

ARTICLE 28

Travel Documents

1. The Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require, and the provisions of the Schedule to this Convention shall apply with respect to such documents. The Contracting States may issue such a travel document to any other refugee in their territory; they shall in particular give sympathetic consideration to the issue of such a travel document to refugees in their territory who are unable to obtain a travel document from the country of their lawful residence.

2. Travel documents issued to refugees under previous international agreements by parties thereto shall be recognized and treated by the Contracting States in the same way as if they had been issued pursuant to this article.

ARTICLE 29

Fiscal Charges

1. The Contracting States shall not impose upon refugees duties, charges or taxes, of any description whatsoever, other or higher than those which are or may be levied on their nationals in similar situations.

2. Nothing in the above paragraph shall prevent the application to refugees of the laws and regulations concerning charges in respect of the issue to aliens of administrative documents including identity papers.

ARTICLE 30

Transfer of Assets

1. A Contracting State shall, in conformity with its laws and regulations, permit refugees to transfer assets which they have brought into its territory, to another country where they have been admitted for the purposes of resettlement.

2. A Contracting State shall give sympathetic consideration to the application of refugees for permission to transfer assets wherever they may be and which are necessary for their resettlement in another country to which they have been admitted.

ARTICLE 31

Refugees unlawfully in the Country of Refuge

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

ARTICLE 32

Expulsion

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to

appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

ARTICLE 33

Prohibition of Expulsion or Return ("Refoulement")

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

ARTICLE 34

Naturalization

The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.

Chapter VI

EXECUTORY AND TRANSITORY PROVISIONS

ARTICLE 35

Co-operation of the National Authorities with the United Nations

1. The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.

2. In order to enable the Office of the High Commissioner or any other agency of the United Nations which may succeed it, to make reports to the competent organs of the United Nations, the Contracting States undertake to provide them in the appropriate form with information and statistical data requested concerning:

(*a*) the condition of refugees,

(*b*) the implementation of this Convention, and

(*c*) laws, regulations and decrees which are, or may hereafter be, in force relating to refugees.

ARTICLE 36

Information on National Legislation

The Contracting States shall communicate to the Secretary-General of the United Nations the laws and regulations which they may adopt to ensure the application of this Convention.

ARTICLE 37

Relation to Previous Conventions

Without prejudice to article 28, paragraph 2, of this Convention, this Convention replaces, as between parties to it, the Arrangements of 5 July 1922, 31 May 1924, 12 May 1926, 30 June 1928 and 30 July 1935, the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 and the Agreement of 15 October 1946.

Chapter VII

FINAL CLAUSES

ARTICLE 38

Settlement of Disputes

Any dispute between parties to this Convention relating to its interpretation or application, which cannot be settled by other means, shall be referred to the International Court of Justice at the request of any one of the parties to the dispute.

ARTICLE 39

Signature, Ratification and Accession

1. This Convention shall be opened for signature at Geneva on 28 July 1951 and shall thereafter be deposited with the Secretary-General of the United Nations. It shall be open for signature at the European Office of the United Nations from 28 July to 31 August 1951 and shall be re-opened for signature at the Headquarters of the United Nations from 17 September 1951 to 31 December 1952.

2. This Convention shall be open for signature on behalf of all States Members of the United Nations, and also on behalf of any other State invited to attend the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons or to which an invitation to sign will have been addressed by the General Assembly. It shall be ratified and the instruments of

ratification shall be deposited with the Secretary-General of the United Nations.

3. This Convention shall be open from 28 July 1951 for accession by the States referred to in paragraph 2 of this article. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

ARTICLE 40

Territorial Application Clause

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for consti-

tutional reasons, to the consent of the Governments of such territories.

ARTICLE 41

Federal Clause

In the case of a Federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal legislative authority, the obligations of the Federal Government shall to this extent be the same as those of Parties which are not Federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent States, provinces or cantons which are not, under the constitutional system of the federation, bound to take legislative action, the Federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of states, provinces or cantons at the earliest possible moment.

(c) A Federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the Federation and its constituent units in regard to any particular provision of the Convention showing the extent

to which effect has been given to that provision by legislative or other action.

ARTICLE 42

Reservations

1. At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1, 3, 4, 16 (1), 33, 36-46 inclusive.

2. Any State making a reservation in accordance with paragraph 1 of this article may at any time withdraw the reservation by a communication to that effect addressed to the Secretary-General of the United Nations.

ARTICLE 43

Entry into force

1. This Convention shall come into force on the ninetieth day following the day of deposit of the sixth instrument of ratification or accession.

2. For each State ratifying or acceding to the Convention after the deposit of the sixth instrument of ratification or accession, the Convention shall enter into force on the ninetieth day following the date of deposit by such State of its instrument of ratification or accession.

ARTICLE 44

Denunciation

1. Any Contracting State may denounce this Convention at any time by a notification addressed to the Secretary-General of the United Nations.

2. Such denunciation shall take effect for the Contracting State concerned one year from the date upon which it is received by the Secretary-General of the United Nations.

3. Any State which has made a declaration or notification under article 40 may, at any time thereafter, by a notification to the Secretary-General of the United Nations, declare that the Convention shall cease to extend to such territory one year after the date of receipt of the notification by the Secretary-General.

ARTICLE 45

Revision

1. Any Contracting State may request revision of this Convention at any time by a notification addressed to the Secretary-General of the United Nations.

2. The General Assembly of the United Nations shall recommend the steps, if any, to be taken in respect of such request.

ARTICLE 46

Notifications by the Secretary-General of the United Nations

The Secretary-General of the United Nations shall inform all Members of the United Nations and non-member States referred to in article 39:

(a) Of declarations and notifications in accordance with section B of article 1;

(b) Of signatures, ratifications and accessions in accordance with article 39;

(c) Of declarations and notifications in accordance with article 40;

(d) Of reservations and withdrawals in accordance with article 42;

(e) Of the date on which this Convention will come into force in accordance with article 43;

(f) Of denunciations and notifications in accordance with article 44;

(g) Of requests for revision in accordance with article 45.

IN FAITH WHEREOF the undersigned, duly authorized, have signed this Convention on behalf of their respective Governments,

DONE at Geneva, this twenty-eighth day of July, one thousand nine hundred and fifty-one, in a single copy, of which the English and French texts are equally authentic and which shall remain deposited in the archives of the United Nations, and certified true copies of which shall be delivered to all Members of the United Nations and to the non-member States referred to in article 39.

[Schedule omitted]

Supreme Court, U.S.
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No. 97-1754

In The

Supreme Court of the United States

October Term, 1998

IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

v.

JUAN ANIBAL AGUIRRE-AGUIRRE,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether this case should be remanded because the facts underpinning the Board of Immigration Appeals' and Court of Appeals' decisions are not the facts of the case.

2. Whether the Court of Appeals erred in reversing the decision of the Board of Immigration Appeals, which held that Respondent is barred from eligibility for the relief of withholding of deportation by operation of the "serious nonpolitical crime" exception of the Immigration and Nationality Act, 8 U.S.C. § 1253(h)(2)(C)(1994).

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STATEMENT

Juan Anibal Aguirre-Aguirre applied for asylum and withholding of deportation before an immigration judge (IJ) in Las Vegas, Nevada, where he still lives and works. AR 120. Mr. Aguirre is a native and citizen of Guatemala. At the time of his deportation hearing in April 1995, he was 25-years old. AR 42, 120. He was born and lived in Penaivia Aguas Blancas in the state of Jutiapa. *Id.* He graduated from college with a degree in accounting. AR 70. He worked in that field for only one month before fleeing Guatemala. *Id.*

Mr. Aguirre's Political Activities in Guatemala and Fear of Being Deported to Guatemala

Mr. Aguirre sought asylum and withholding of deportation in the United States because he was afraid he would be murdered or gravely injured if he were forced to return to Guatemala. AR 127, 128, 129. The United States is the safest place he could think of. AR 133.

Because Mr. Aguirre is young, and because of his active involvement in political groups in Guatemala, he has reason to fear that his life would be in danger. Among other things, he was threatened by guerrillas who he is certain have the capability and willingness to hurt him. *Id.*

Mr. Aguirre received threats from both sides in the Guatemalan conflict: from the government and from guerrillas. AR 127-129, 131. He believes that both the Guatemalan government and the guerrillas fighting the government are a threat to his life. *Id.* Both of these groups have the ability and have shown a willingness to brutally torture and murder anyone they even suspect of participating in activities that each group considers to be in opposition to them. AR 129.

Mr. Aguirre was vice president of the "Directiva," the student body at his school, for six years. AR 75, 77. This was a high profile position, so that most students and

faculty and people in the university knew that he was in that position; this was true also because they were the ones who were electing him. AR 78, 80. His responsibiiities included notifying all the members of the demonstrations and being on guard to observe how well the demonstrations went. AR 75, 78. The student body also worked with the faculty to receive information and pass it around to the rest of the people. *Id.*

In 1988, at the age of 19, Mr. Aguirre became involved with the Sindicato Estudiantil (student union) (SE). AR 127. This was a national group that was active on many campuses and in many areas in Guatemala. AR 127, 79. Mr. Aguirre was active with this group until he was forced to flee Guatemala in late 1992. AR 130.

The SE kept undercover and were very secretive. AR 127. In Jutiapa there were 22 local units, or cells, with over 1,000 members in that Department. AR 71, 127. Mr. Aguirre was a leader of the Agua Blanca group of the SE in Jutiapa. AR 127. As a leader, he would receive information for distribution to other members in the Agua Blanca cell. AR 71, 127. He would contact a core of about 15 members who would notify the rest of the Agua Blanca group of their plans. *Id.*

The SE viewed itself as a moderating force. AR 127. Their purpose and goal was to cause civil unrest against the government for government policies or activities that infringed too greatly on the rights of the people. AR 130. The SE would set up roadblocks, burn tires and buses and generally create civil disturbances. AR 127. They also would help organize strikes when they thought it was necessary to protest government policy, action, or inaction.

When a body of someone who had been killed was discovered, the SE would go out and strike, burn buses, break windows, or attack police cars. AR 72. The SE protested the fact that the government never investigated deaths or disappearances. AR 72.

Mr. Aguirre and other group members began receiving anonymous death threats, telling them to stop their activities or suffer the consequences. AR 73-74, 127, 131. He believes that the threats were from right-wing government agents because the notes also told him "to be a good citizen" and because the last two were on official government stationary. AR 74, 127, 131. In fact, five members of the SE were found dead in different areas through a period of six months before Mr. Aguirre fled Guatemala. AR 80-81. The government never investigated the killings, so people suspected the government was responsible. AR 8. However, apparently in one case it was the guerrillas who were responsible. AR 81, 83. That person was found dead in Guatemala City. AR 83.

Mr. Aguirre also was personally threatened by people he believes were guerrillas. AR 127, 131. The guerrillas would know all about the SE's activities, because they have people who infiltrate the groups. AR 81. In June 1992, Mr. Aguirre was in a soccer field with his friend Carlos Gonzales and two other friends. AR 127, 131. Three men who were dressed in guerrilla uniforms approached them and told them to cease their activities or they would suffer the consequences. AR 81-82, 127, 131. The guerrillas asked Mr. Aguirre and the other three to support them but they refused. AR 82.

It is commonly understood in Guatemala that the "consequences" are death when the threat is received from guerrillas or a member of the military. AR 131. The guerrillas viewed the SE as competitors, although their goals were similar in that their target was the government. AR 82, 127. It was clear to Mr. Aguirre that the guerrillas were referring to his activities in the SE. AR 131. Mr. Aguirre believes that of course the guerrillas could kill him and that they would kill him. AR 82.

The guerrillas also said that they suspected that Mr. Aguirre was in the military, which would make him the guerrillas' target. AR 127. In fact, Mr. Aguirre had been forced to join the Military Reserves. AR 130. As such, he

was required to carry the military identification with him at all times. AR 127. The guerrillas frequently established roadblocks where they would check for military identification. Anyone caught with that identification would be in danger. *Id.* If the guerrillas ever found him with the military identification they would kill him. AR 85.

At the soccer field, the guerrillas did not ask for identification or search Mr. Aguirre but they threatened him because of his involvement with the SE and his suspected involvement in the military. AR 127-128. Mr. Aguirre does not believe that the Guatemalan government is capable of controlling the guerrillas. AR 131.

Mr. Aguirre was forced to join the Military Reserves to avoid being drafted into full time military service. AR 130. He served three times a week, 12 times a month, and was on active duty for one year. AR 85.

Just before Mr. Aguirre fled Guatemala he was arrested and held for three hours until he could prove that he had fulfilled his military obligation. AR 131. He was questioned, forced to exercise, and his hair was shorn off. *Id.* He was released after proving that his military commitment had been met. *Id.*

Mr. Aguirre had reason to fear the consequences of being in the military. His uncle, Edgar Rolando Aguirre-Castillo, was in the military (Mr. Aguirre is uncertain of the dates). AR 130. In August 1989, he was brutally murdered by the guerrillas while traveling with Felipe Antonio Zamorra de la Cruz, former national deputy of the police in the narcotics division. *Id.* Mr. Aguirre-Castillo had been in the United States under temporary protected status but returned to Guatemala for unknown reasons. He was murdered when the guerrillas stopped his car and discovered who the men were. *Id.* Mr. Aguirre believes that his uncle was murdered by the guerrillas because of his status as a former military man. AR 131, 84. No one has ever been brought to justice for this crime. *Id.*

Mr. Aguirre also was a member of the UCN (Union del Centro Nacional). AR 130, 85. The UCN is a right-wing political party that at that time was headed by Jorge Carpio Nicolle, who was assassinated in late 1993 (after Mr. Aguirre fled Guatemala). Mr. Aguirre was a rank-and-file member of the UCN from early 1990 until he left Guatemala in late 1992. AR 130. Mr Aguirre's father, Juan Francisco Aguirre, was a UCN member for eight years. AR 130. Mr. Aguirre himself participated in organizing and attending political rallies for their candidates and also demonstrations against the government. AR 130, 85. He also helped recruit new members to the party. AR 86.

A few days before Mr. Aguirre fled Guatemala, a government official threatened him because of his activities with the UCN. AR 86, 87. His name was Julio Palmanale; he was a member of the Guatemalan Congress. AR 86. He told Mr. Aguirre to stop recruiting people to join the UCN and to join his party instead. Mr. Palmanale was the highest official there; he said that if Mr. Aguirre did not do what he was being asked to do, he could count on the consequences and would see what would happen to him. *Id.* Mr. Aguirre saw this as a threat, and believed he would be harmed. AR 87. About a week later, he fled Guatemala for the United States. AR 87.

Also around the same time, Mr. Aguirre was informed by Ferdy Barganza, a former secretary in the Congress in Guatemala City, that five people in each Department were earmarked for execution. AR 128, 88. Mr. Berganza was a big politician and he knew everything there. AR 89. Mr. Berganza was also Mr. Aguirre's friend; Mr. Aguirre had been on his football team, and Mr. Berganza was very fond of him. AR 89. For these reasons, he gave Mr. Aguirre the warning. *Id.* Mr Aguirre feared that he might be among those targeted to be killed, and he knew that the government and the military both were capable of such action, so he fled Guatemala. AR 128, 89. In fact, he learned after he left that one of the leaders in his Department had been executed. *Id.*

In addition, Mr. Aguirre's cousin, Juvenio Aguirre, was a member of the SE until his death on December 30, 1989. AR 130. He was active in a cell and died during a street demonstration organized by the SE. AR 130, 131. Mr. Aguirre never learned the cause of his death. His companions removed his body quickly and no autopsy was ever performed, to Mr. Aguirre's knowledge. *Id.* However, the government police often opposed the SE, and Mr. Aguirre believes they killed his cousin during that demonstration.

After coming to the United States, Mr. Aguirre received a letter from the director of his former school, informing him that unknown people had been at the school asking where they could find him. AR 128, 89-90. The school director advised Mr. Aguirre to stay out of Guatemala in order to ensure his safety. AR 128, 90, 146-48.

Mr. Aguirre knows that many people have been killed in his country, and the killing has not stopped. AR 129. The government either will not or cannot do anything to prevent it. Some people suspect the government and the military may be cooperating in the illegal activities. *Id.* He is afraid to return because he fears being murdered. *Id.* Mr. Aguirre is afraid that either the guerrillas or the government or a secret group associated with the government might kill him. AR. 90. This is a very valid fear in Guatemala. AR 129.

The Hearing Interpreter and Transcriber Errors

Mr. Aguirre testified in Spanish at his hearing; an INS-provided interpreter interpreted the English questions to Mr. Aguirre and interpreted his Spanish answers for the court and attorneys. Neither the IJ nor Mr. Aguirre's attorney understood Spanish.

As typical in immigration court proceedings, no court reporter was present. The IJ taped the hearing and a transcript of the tape was made later, by someone who had not been present at the hearing. The transcript was

made part of the administrative record; it is the transcript that the Board of Immigration Appeals (BIA) and Court of Appeals used, and is the same transcript the INS has cited in its brief.

After the INS filed its Petition for Certiorari in this case, counsel for Mr. Aguirre obtained a copy of the hearing tape from the INS through the assistance of the Solicitor General's office. The Solicitor General lodged a copy of the hearing tape with this Court.

At Mr. Aguirre's attorney's request, a certified federal court interpreter listened to the hearing tape. He found numerous errors and omissions in the translation from English into Spanish and from Spanish into English, and some errors in the transcription. His statement, and his corrected transcript of the most relevant sections, were lodged with this Court on September 23, 1998.

Counsel for Mr. Aguirre filed with the BIA a Motion to Remand on December 14, 1998, requesting that the case be remanded to the IJ for a new merits hearing because of the mistranslation and mistranscription in the original hearing. The motion details the most relevant errors and omissions made by the interpreter and transcriber. The motion is pending. A copy of the Motion is attached in Respondent's Appendix, hereto. App. 1.[1]

The Immigration Judge's Decision

In his decision, the IJ said he had observed Mr. Aguirre's testimony and demeanor and found him to be "a credible witness worthy of belief." AR 51. The IJ found that because of Mr. Aguirre's political opinions and activities in Guatemala, Mr. Aguirre meets the requirements for asylum and also for the higher standards for withholding of deportation. AR 43. There is sufficient objective evidence to show that Mr. Aguirre was very involved in political activities and did receive threats from the

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[1] App. is the Respondent's Appendix, attached hereto.

guerrillas and also from the government because of his activities.

After a detailed recitation of the facts from the record, the IJ rejected the INS's suggestion that Mr. Aguirre was a criminal or a terrorist. "No one was ever hurt" the IJ found. AR 54. "His acts were politically motivated" *Id.* All the threats and acts by the government and others were based on political grounds. *Id.* Also, the IJ said, "Guatemala is a very violent country with a long history of cruelty, civil strife, and human rights violations by the government, by right wing government support groups, and by the guerrillas. His activities and those of his fellow students must be viewed in this perspective." AR 54-55.

The IJ concluded that after considering all of the evidence, including the acts of property damage and vandalism and perhaps assault connected therewith, he nevertheless believed that those factors were outweighed by the favorable factors. He granted asylum as a matter of discretion, and also granted withholding. AR 55.

The BIA's Decision

The INS appealed the IJ's decision to the BIA.[2] The BIA did not disagree with the IJ's credibility determination. AR 6-10. It did not discuss or reach the merits of either the asylum or withholding applications. The BIA rejected the INS's argument that Mr. Aguirre was a terrorist or a danger to the community. AR 9. It found that the criminal nature of Mr. Aguirre's acts outweighed their political nature and that consequently he is barred from withholding. *Id.* The BIA did not hold that Mr. Aguirre had committed any crime, nor that any such crime was "serious." AR 6-10. It did not find that there were

[2] Mr. Aguirre's then-attorney did not file a brief at the BIA and filed a motion to withdraw as counsel two weeks after the BIA issued its decision. AR 2-4.

"serious reasons for considering" the withholding exception applied. *Id.* It also did not discuss or reach the question of whether Mr. Aguirre's fear and risk of harm upon deportation to Guatemala should be considered. *Id.*

SUMMARY OF ARGUMENT

Due process dictates that this case be remanded to the agency for a new merits hearing on Mr. Aguirre's applications for asylum and withholding. Crucial facts on which the BIA and Court of Appeals based their decisions were incorrect because the INS hearing interpreter and transcriber made serious errors of omission and commission. The INS has made the degree and extent of Mr. Aguirre's conduct pivotal in this case, and the errors and omissions describe that conduct. Specifically, the "official" record reads as if Mr. Aguirre admitted having committed violent conduct toward civilians that he did not in fact admit. It also reads as if he twice failed to deny the charges of committing this violent conduct. Both times the hearing interpreter failed to interpret crucial words, so that the questions Mr. Aguirre was asked were not the questions he heard or answered.

The INS cannot argue that Mr. Aguirre "waived" objection to these errors. He had no knowledge of them and could not reasonably have discovered them. Respondents in immigration court proceedings do not receive the tapes of their hearings. The errors and omissions were caused by INS employees, acting within their official capacities, not by Mr. Aguirre. The INS cannot proceed to deport Mr. Aguirre to Guatemala when it knows that pivotal facts upon which it bases that deportation may not be true.

The Court can proceed to a decision on the merits if it affirms the Court of Appeals, which itself ordered a remand to the agency. Respondent filed a motion to remand with the BIA seeking a new IJ hearing. That motion is pending.

If the Court decides this case on the merits, it should find that deference to the INS's litigation position is not warranted. The BIA never has adopted a precedent decision forbidding consideration of the risk or degree of persecution the withholding applicant fears in assessing the serious nonpolitical crime exception to withholding. Nor has the Attorney General ever promulgated such a regulation. The BIA did not even reach the issue in this case. Therefore, there is no official agency position to which the Court should defer. The INS position is only that, a litigation position, to which deference is not warranted.

Deference to the BIA decision in this case is not warranted for numerous reasons. The BIA has been inconsistent when applying this and related exceptions to the withholding statute. The BIA's decision here also contradicts its own precedent that an IJ's decision regarding the accuracy, reliability and truthfulness of a witness is to be given significant deference. The BIA decision here also was cursory and poorly reasoned. It was not context-specific nor sensitive to Mr. Aguirre's need for safe haven.

Affirmance also is appropriate on the merits. That is, there is a statutory standard for evaluating the serious nonpolitical crime exception, and the IJ and the court of appeals correctly followed that standard, but the BIA did not. The statute requires that each element be separately considered and that there be "serious reasons" for finding each element to be satisfied. To be consistent with the mandatory nature of withholding and with the purpose and structure of the statute, the INS must carry the initial burden of proving a prima facie case with respect to each element. As the IJ found, the INS did not meet that burden here, and none of the elements was established. Specifically, the actions in which Mr. Aguirre was involved in Guatemala were "political" and he did not commit any "serious crime" in the context in which they

occurred. The IJ also appropriately considered the risk to Mr. Aguirre if he is deported to Guatemala.

It is appropriate to consider the threat to the withholding applicant's life or freedom when assessing the serious nonpolitical crime exception. That is, if a refugee will be forcibly expelled to face death, torture, or severe mistreatment because of his or her political activities, the crime that justifies the expulsion must be very grave. The drafters of the Convention anticipated that this "balancing" would be necessary, and the Handbook's balancing test is consistent with and memorializes that intent. The Court of Appeals appropriately directed the BIA to reassess Mr. Aguirre's applications with these statutory standards. The Court of Appeals did not direct a result, but only remanded for the BIA to reconsider Mr. Aguirre's application.

ARGUMENT

I. THIS MATTER MUST BE REMANDED TO THE IMMIGRATION JUDGE FOR A NEW MERITS HEARING BECAUSE CRUCIAL FACTS ARE IN DISPUTE AND THIS COURT DOES NOT FIND FACTS IN THE FIRST INSTANCE

A. The INS-Provided Interpreter at the Original Hearing Made Crucial Errors Of Omission and Commission Such That Mr. Aguirre's Testimony Was Mistranslated and He Did Not Hear, Understand, or Answer the Questions He Was Asked.

As detailed in the Motion to Remand filed with the BIA, the hearing tape reveals that the INS-provided hearing interpreter made many significant errors, and that the tape transcriber compounded the problem by making

others.[3] Among many other errors and omissions, the hearing interpreter translated Mr. Aguirre's testimony to say that he and his compatriots would "stone" the bus passengers before the buses were burned. This is not what Mr. Aguirre testified. He testified that no one was hurt during the bus burnings because the protesters would stop the buses, get all the people off, and throw rocks at the buses.

Moreover, in subsequent questions, the transcript shows that the TA twice asked Mr. Aguirre about "throwing rocks" at people and he did not deny it. The reason he did not deny throwing rocks at people was because both times, the interpreter did not ask him that part of the question. He never heard that he was being accused of throwing rocks at people. And because only the questions the TA asked appear in the transcript and not the Spanish questions actually put to Mr. Aguirre, a reader of the transcript believes that Mr. Aguirre did not deny committing the violent conduct of which the TA accused him.

B. Due Process Would Be Violated By Proceeding With This Case When The INS Knows That Its Version of Pivotal Facts May Be Wrong

The INS bases its entire case on Mr. Aguirre's testimony. The INS does not deny that the hearing interpreter made errors of commission and omission during that testimony, resulting in an "official" record that contains numerous errors.

In his brief in opposition to the Petition for Certiorari, and again in the corrected transcript lodged with this Court, and again in his Motion to Remand, Mr. Aguirre detailed the errors and omissions the interpreter and transcriber made. In its reply brief at the certiorari

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[3] INS hearing interpreters are not necessarily certified as court interpreters. *See El Rescate Legal Services, Inc. v. EOIR*, 959 F.2d 742 (9th Cir. 1992).

stage, the INS disputed one element of the corrected transcript but did not dispute that the interpreter and transcriber had made the other errors Respondent detailed. Primarily, the INS argued that it was too late for Mr. Aguirre to point out the errors, and that the disputed facts did not matter.

The INS has built its case on its characterization of Mr. Aguirre's conduct, derived from the inaccurate interpretation, without so much as noting any dispute about its accuracy. But further, the INS grossly and misleadingly exaggerates the protesters' conduct, in particular Mr. Aguirre's conduct.[4] Rather than demonstrating that the disputed facts do not matter, the INS has made the disputed facts pivotal in this case.

The INS argues, for example, that "[b]ased on the record before the Board, there plainly was substantial evidence to support its determination that respondent's acts . . . constituted serious nonpolitical crimes." Pet.Br. at 42. All of that evidence, however, was from Mr. Aguirre's misinterpreted testimony, and the "record" before the Board on which the INS based its case was fatally flawed.

This Court does not sit as finder of fact in the first instance. Crucial testimony in Mr. Aguirre's hearing was incorrectly interpreted. Due process dictates that this case not proceed to a decision on this record, but rather be remanded for new, accurate merits hearing.

C. Mr. Aguirre Did Not Waive Objection to the Mistranslations and Mistranscriptions.

The INS suggested in its Certiorari Reply Brief, and may repeat here, that Mr. Aguirre could have requested a copy of the tape earlier by filing a request under the

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[4] *See* Pet.Br. 44, n. 18 equating Mr. Aguirre's conduct with that of truck driver Reginald Denny. *See also* Pet.Br.42: "Respondent testified that, on numerous occasions, he would stone, beat with sticks, and bind innocent civilians . . . "

Freedom of Information Act, 5 U.S.C. § 552. Cert.Reply Br. at 1, n. 1. There are several responses to this suggestion:

First, this is not a situation in which "waiver" is an appropriate defense for the government. Mr. Aguirre did not voluntarily or knowingly waive his right to an accurate, fair hearing. Mr. Aguirre must be able to rely on the accuracy of immigration court employees' work, as must this Court. Mr. Aguirre could not "waive" his objections to the inaccuracy of their work until the inaccuracy became known or reasonably should have been discovered.

The INS cannot seriously claim that the significant errors in translation and transcription should have been discovered any earlier than they were.[5] Respondents in immigration court proceedings are not provided the tapes of their hearings. To make that claim would mean that the INS expects all respondents in immigration proceedings to routinely file FOIA requests for the tapes in their cases. That action likely would bring the entire immigration court system to a grinding halt.

Further, filing a FOIA request at any prior stage of these proceedings likely would have been only a theoretical remedy. INS objections to and delays in processing FOIA requests are legendary and have been the source of consideration litigation.[6] Even with the personal and

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[5] As noted in the Statement, no one was aware of the interpreter's errors and omissions, because neither Mr. Aguirre's hearing counsel nor the IJ spoke Spanish and of course the errors and omissions are not revealed in the transcript but only on the hearing tape. Even when Mr. Aguirre's current counsel requested the Solicitor General to obtain the tape, she was not aware of what the tape would reveal.

[6] *See, e.g., Maynard v. CIA*, 986 F.2d 547, 564 (1st Cir. 1993) (INS search not inadequate simply because it took 17 months to locate request); *Cudzich v. U.S. INS*, 886 F. Supp. 101, 106-08 (D.D.C. 1995) (withholding documents under investigation-by-other agency theory); *Buffalo Evening News v. Border Patrol*, 791 F. Supp. 386 (W.D.N.Y. 1992) (upholding extensive redaction on internal, investigatory, and privacy grounds); *U.S. v. Colima-Monge*, 978 F. Supp. 941 (D.Org. 1997) (disclosing documents in deported co-defendant's file over INS' FOIA objections).

urgent intervention of the Assistant to the Solicitor General here, acting upon a request from counsel for Mr. Aguirre after the Solicitor General had filed the Petition for Certiorari with this Court, the INS delayed approximately three weeks in producing the tape.

Fundamental fairness dictates that the INS not be able to rest on any "waiver" claim here when the errors and omissions in the record were caused by their employee, and when they have made this case turn on the pivotal, challenged testimony. Most importantly, the INS cannot proceed to deport Mr. Aguirre to Guatemala when it knows that pivotal facts upon which it bases that deportation may not be true.

D. This Court Has Ordered Remand Pursuant to 28 U.S.C. § 2106 in Analogous Situations.

This Court may vacate the judgment of the Court of Appeals and remand it with directions or require further proceedings as may be just under the circumstances. 28 U.S.C. § 2106. When the record below is conflicting or questionable or insufficient, this Court has not hesitated to remand for a new hearing or trial. *See, Communist Party of the United States v. Subversive Activities Control Board*, 351 U.S. 115, 124-25 (1956). In *Communist Party*, this Court said that it cannot pass upon a record containing challenged testimony but must remand to make certain that the Board bases its findings upon untainted evidence; because the basis for the challenge was not in existence when the proceedings were concluded before the Board, the Board may hold a hearing to ascertain the truth of the

allegations or may assume the truth of the allegations and then reconsider its original determination in light of the record freed from the challenge that now beclouds it. *See also, Willing v. Binenstock*, 302 U.S. 272, 276 (1937) (where facts are not sufficiently disclosed by the record to enable Supreme Court to dispose of an issue, the case must be remanded to the lower court with authority, in its discretion, to take further evidence); *Panama Mail Steamship Company v. Vargas*, 281 U.S. 670, 671-72 (1930) (where evidence is conflicting, the decree below should be vacated and the case remanded to the district court to retry the case if necessary); *see also Wood v. Georgia*, 450 U.S. 261 (1981) (§ 2106 authorizes the Court to remand a case in the interest of justice in light of issues or questions not technically raised below).

The BIA itself has remanded a case to an asylum officer when the record was flawed. *Matter of S – S –*, Int. Dec. 3257 (BIA 1995). In that case, the applicant argued that his asylum interview was flawed and the record of it inadequate due to faulty translation and lack of transcription. Although not conceding the particulars, the BIA agreed that it could not enter a decision on the basis of the record as it was:

> In order to fully and fairly review a decision entered in a case, this Board must have before it the primary evidentiary matters relied upon by the initial adjudicator. For example, in the adjudication of appeals taken in deportation proceedings, the record will normally contain a verbatim transcript of the proceedings below.
>
> *Id.*, 1995 BIA LEXIS 22 at *6, footnote omitted.

In this case, the "verbatim" transcript is not verbatim. It does not accurately reflect Mr. Aguirre's testimony, nor the questions he actually was asked. The INS cannot be heard to say that his testimony does not matter. Mr. Aguirre's testimony is the only evidence on which

the INS based its charge that he committed a serious non-political crime. The interests of justice require that this case be remanded for a new merits hearing before the IJ.[7]

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[7] In the alternative. the Court may determine to affirm the Court of Appeals' decision on the merits for the reasons set forth in the remainder of this brief. In its decision, the Court of Appeals ordered the case be remanded to the BIA for further proceedings. Pending at the BIA is Mr. Aguirre's motion to remand for a new hearing by the IJ, for the reasons discussed in Argument I, supra. If this Court affirms the Court of Appeals' decision, the case will go back to the BIA and then, presumably, to the IJ for a new hearing.

There is an additional ground for remand. *See* Op.Cert 20-21, discussing AEDPA § 413(f), amending § 1253(h) to add 1253(h)(3). The INS argues that this section does not apply to Mr. Aguirre's case because the BIA dismissal of the INS's appeal of the IJ's order constituted "final action." Pet.Br.31-32, n. 13. Section 413(f) does apply to this case. The statute refers to "final action," not "final BIA action." The BIA's dismissal is not necessarily final action, as this case well illustrates. *See also, Rivera v. INS*, 810 F.2d 540, 541 (5th Cir. 1987), *quoting Matter of Lok*, 18 I&N Dec. 101, 107 (BIA 1981) (when court reverses BIA's order of deportation, court's order nullifies the BIA order and restores the alien's status).

The INS also is incorrect that § 1253(h)(3) applied only to the "particularly serious crime" bar to withholding, § 1253(h)(2)(B). Section 1253(h)(3) read: "Notwithstanding any other provision of law, ¶ (1) shall not apply to any alien if the Attorney General determines that. . . . (B) the application of ¶ (1) to such alien is necessary to ensure compliance with the 1967 United Nations Protocol Relating to the Status of Refugees." *See Matter of Q – T – M – T –*, Int. Dec. 3300, slip op. at 6 (BIA 1996). On its face, § 1253(h)(3) applied to "any other provision of law," including § 1253(h)(2)(C) as well as § 1253(h)(2)(B).

II. DEFERENCE TO THE INS'S LITIGATION POSITION ON THE STATUTORY STANDARDS FOR AND PROCEDURES FOR DETERMINING "SERIOUS NONPOLITICAL CRIME" IS NOT WARRANTED BECAUSE THE AGENCY NEVER HAS ADOPTED THIS POSITION IN A PRECEDENT DECISION OR REGULATIONS.

The INS urges deference to its interpretation of the statutory standards for assessing the "serious nonpolitical crime" exception to withholding of deportation, 8 U.S.C. § 1253(h)(2)(C). Specifically, the INS says that the persecution to be suffered by a deported refugee is never to be considered in evaluating the serious nonpolitical crime exception.

The INS's position is not entitled to deference. The BIA never has issued a precedent decision on the merits adopting the position the INS now urges; the closest the BIA has come to a precedent decision on this issue is contrary to the INS position; BIA decisions on this and related questions have been conflicting; the Attorney General never has promulgated regulations interpreting the meanings of these terms; and the BIA did not even reach the issue in the case at bar.

A. The Closest the BIA Has Come to A Precedent Decision on the "Balancing" Issue is Contrary to the INS's Position in This Litigation.

In its first reported decision on the application of the "serious nonpolitical crime" exception to withholding of deportation, the BIA looked to the Handbook for "an interpretation of the meaning and application of the terms used in the Protocol." *Matter of Rodriguez-Palma*, 17 I&N Dec. 465, 468 (BIA 1980). *Rodriguez-Palma* was decided soon after passage of the 1980 Refugee Act. Among other things, the Refugee Act added the concept of serious nonpolitical crime to the INA. The Board had to decide whether this Mariel Cuban had committed a

serious nonpolitical crime in Cuba before he came to the United States.

The BIA noted that the Conference Report that accompanied the final version of the Refugee Act indicated that it was Congress' intent that § 12533(h) be construed consistently with the Protocol. 17 I&N Dec. 468. The BIA looked to the Protocol for guidance as to the meaning of the term, but finding none, referred to and quoted from the Handbook's ¶¶ 155 and 156.[8] Paragraph 156 calls for a balance to be struck between the nature of the offense and the degree of persecution feared; if a person has a well-founded fear of very severe persecution, the Handbook says, a crime must be very grave in order to exclude him. 17 I&N Dec. 468. The BIA concluded that *Rodriguez-Palma* had committed a "serious nonpolitical crime" whether it applied a balancing test or simply looked at the nature of the offense. 17 I&N Dec. 469.

Shortly thereafter, the BIA considered the same issue in another Cuban Marielito case, *Matter of Ballester-Garcia*, 17 I&N Dec. 592 (BIA 1980). There, the Board said there were serious reasons to believe the exception applied, "whether the traditional view or the balancing test referred to in *Matter of Rodriguez-Palma* is applied." *Id.* at 596.

To date, *Rodriguez-Palma* and *Ballester-Garcia* are the closest the BIA has come to a precedent decision on the question whether the risk of persecution is considered in applying the serious nonpolitical crime exception. Both cases presented the issue on its facts, *Rodriguez-Palma* referred to the Handbook's balancing test as guidance, and quoted it, and *Ballester-Garcia* cited *Rodriguez-Palma* for the balancing test.

The INS cites *Matter of Rodriguez-Coto*, 19 I&N Dec. 208 (1985) as precedent for its position that the risk of

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[8] Relevant sections of the Handbook are reproduced in Respondent's Appendix, hereto.

persecution should never be considered, but the case is not precedent for the INS's position. First, the case did not even present the serious nonpolitical crime issue. The applicant had committed a crime in the United States and the issue was whether the separate "particularly serious crime" exception applied, 8 U.S.C. § 1253(h)(2)(B). *Id.* at 208, n. 1. Second, the BIA gave several other, fully adequate reasons why relief would be denied before mentioning the balancing test. Then, the BIA noted that even if it were to balance the applicant's crime against the nature of the persecution he claimed he would have faced, his crime would have rendered him ineligible under 8 U.S.C. § 1253(h)(2)(B). Then, in dictum, the BIA said that it did not consider that the interpretations of the phrases "particularly serious crime" and "serious nonpolitical crime" should "vary with the nature of evidence of persecution." *Id.* at 209.

In a one-sentence footnote, devoid of analysis, the BIA dismissed its prior precedent decisions, *Rodriguez-Palma* and *Ballester-Garcia*. *Id.* at 209, n. 2. Although the serious nonpolitical crime exception had been at issue in the earlier cases but was not at issue in *Rodriguez-Coto*, the BIA said, without apparent irony, that it had not found it necessary to resolve the issue in the earlier cases "but do so here." *Id.*

In the five years between *Rodriguez-Palma* and *Rodriguez-Coto*, there had not been any change in the statute, but there had been a change in the underlying politics of these "Marielitos" cases. These cases all resulted from the influx of thousands of Cubans in the Mariel boatlift. The BIA decided *Rodriguez-Coto* in the narrow window between 1984, when the United States and Cuba negotiated an agreement for the return of some 2,746 inadmissible Cubans, and 1985, when Cuba suspended the agreement on commencement of broadcasts by Radio Marti. *See* G. Goodwin-Gill, The Refugee in International Law (2d ed. 1996) 107-08, n. 152. For this reason, the case is sui generis, and its holding regarding

serious nonpolitical crimes has even less precedential value.

Further, three years after *Rodriguez-Coto*, the BIA applied a realistic, totality of the circumstances analysis to a related withholding exception. It held that the burning of cars, destruction of property, and rebel groups' forcible recruiting and disciplining of civilian members do not constitute persecution because they are actions typically within the nature of civil wars. *Matter of Rodriguez-Majano*, 19 I&N Dec. 811, 815-16 (BIA 1988). Other reported BIA decisions also are inconsistent with the unreported decision in this case. For example, the BIA has conceded that violent actions may be the only option for people seeking to change the political structure of their governments. *Matter of Izatula*, 20 I&N Dec. 149, 153-54 (BIA 1990), *citing Dwomoh v. Sava*, 696 F. Supp. 970, 979 (S.D.N.Y. 1988).

The BIA never has issued a precedent decision supporting the INS's argument herein. Because *Rodriguez-Palma* and *Ballester-Garcia* presented the serious nonpolitical crime issue, they are the closest to a precedent decision. At a minimum, the BIA has been inconsistent in its pronouncements on this exception. The INS litigation position is not entitled to deference. *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212-13 (1988) (agency not entitled to deference when its interpretation is presented for the first time as a litigation position).

B. The Attorney General Has Not Issued Regulations Announcing A Position on This Question; Nor Did the BIA Decide this Question in The Case At Bar.

The Attorney General never has issued a regulation or decision forbidding the BIA or IJs from considering the risk of harm an applicant faces in a § 1253(h)(2)(C) case. *See Batanic v. INS*, 12 F.3d 662, 666 (7th Cir, 1993) (it is an agency's exercise of its judgment in a sufficiently authoritative manner that warrants the court's deference; where

there are no regulations or similarly authoritative pronouncements, deference is not warranted). That the Attorney General (and the BIA) have not had occasion to render decisions on this question is reasonable and not surprising. As Mr. Aguirre argued in his Brief in Opposition to Certiorari, cases presenting the serious nonpolitical crime exception to withholding have been almost nonexistent since the early 1980s and will continue to be extremely rare.

In fact, the BIA in this very case did not reach this issue. The decision never mentions balancing or considering the risk or degree of persecution; in fact, it scarcely mentions Mr. Aguirre's fear of being deported to Guatemala. The INS repeatedly asks for deference to "the Attorney General," but tellingly, the INS's brief almost never refers to the BIA decision itself.

It is entirely possible that if Mr. Aguirre's case had proceeded on remand from the Court of Appeals, the BIA would have rejected the "rule" in *Rodriguez-Coto* as the dictum it was, and would have referred to the Handbook for guidance, as it says it does and as it has done in cases both before and after *Rodriguez-Coto*. Considering the risk of harm to Mr. Aguirre if he is deported to Guatemala, the BIA may very well have affirmed the IJ's decision.[9]

[9] Because the BIA has not ruled on this issue and did not consider it in this case, the Court may determine that the Ninth Circuit should have permitted the BIA to decide this issue in the first instance. In that event, it would be appropriate to order a remand to the BIA for it to decide whether the risk and degree of persecution to the applicant is ever relevant in assessing this withholding exception and to apply that decision to Mr. Aguirre's case.

III. THE COURT OF APPEALS AFFORDED THIS BIA DECISION THE APPROPRIATE DEGREE OF DEFERENCE

There are numerous reasons why the BIA's unreported decision in this case is not entitled to heightened deference. First, the BIA has acted inconsistently when applying this and related exceptions. *INS v. Cardoza-Fonseca*, 480 U.S. 421, at 446, n. 30 (1987); *Bowen v. Georgetown University Hospital*, 488 U.S. at 212-213. In addition to the BIA's inconsistent and conflicting precedent on this and related issues, the INS published asylum regulations in 1988 that set forth an interpretation of the serious nonpolitical crime exception that is consistent with the Court of Appeals' decision below. *See* 53 Fed. Reg. 11300-11301 (April 6, 1988).[10] That is, only three years after *Rodriguez-Coto*, the INS directed that, to be consistent with the Convention and Protocol, the serious nonpolitical crime bar was to be applied in asylum cases with full consideration of the totality of circumstances and equities on a case-by-case basis. The INS said:

> [E]vidence of the commission of such non-political crimes will now be a discretionary factor to

[10] The serious nonpolitical crime exception had been in the INS's asylum regulations since 1980; the INS proposed deleting it in 1988 and then deleted it in 1990. The INS deleted this exception "because of serious concerns with respect to the difficulties in determining the validity of allegations of 'serious non-political crimes' committed prior to arrival in the United States." 53 Fed. Reg. 11300-11301. The same bar has been in the withholding statute consistently since 1980. By regulation, every asylum application is also considered to be an application for withholding. *INS v. Stevic*, 467 U.S. 407, 420 n. 13 (1984); 8 CFR 208.3(b). Therefore, the INS's suggestion that the serious nonpolitical crime issue is of greater significance now that the exception has been placed into the asylum statute is not persuasive.

> be considered together with the totality of circumstances and equities on a case-by-case basis consistent with the proper intent of the Refugee Act of 1980 as well as the 1951 U.S. Convention and the 1967 Protocol Relating to the Status of Refugees.

The "equities" in any particular case would include the persecution an applicant faces upon forced return to his or her country. The "totality of the circumstances" would include the political purposes of the act and the political and social conditions in the home country at the time of the alleged crime. The BIA's failure to consider the totality of circumstances and all the equities on a case-by-case basis is precisely why the Court of Appeals reversed the BIA's decision.

The BIA's decision here also is not entitled to deference because it contradicts its own precedent that an IJ's finding regarding the accuracy, reliability, and truthfulness of a witness is given significant deference and ordinarily will not be disturbed.[11]

See also, Universal Camera Corp. v. NLRB, 340 U.S. 474, 496 (1951) (the impartial, experienced examiner who observed the witnesses and lived with the case drew different conclusions than the NLRB); *Marquez v. INS*, 105 F.3d 374, 378 (7th Cir. 1997) ("by laying a coat of confusion on top of the Immigration Judge's more intelligible opinion the BIA undermines our confidence in it.")

Here, without explanation or justification, the BIA disregarded the considered opinion and judgment of the IJ, who heard all the testimony, observed Mr. Aguirre, considered the evidence, and issued a detailed, carefully

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[11] *Matter of Y – B –* , Int. Dec. 3337 (BIA 1998); *Matter of A – S –* , Int. Dec. 3336 (BIA 1998); *Matter of Pula*, 19 I&N Dec. 467 (BIA 1987); *Matter of Kulle*, 19 I&N Dec. 318 (BIA 1985); *Matter of Boromand*, 17 I&N Dec. 450 (BIA 1980); *Matter of Magana*, 17 I&N Dec. 111, 114 (BIA 1979); *Matter of Teng*, 15 I&N Dec. 516 (BIA 1975). *See also, Garcia v. INS*, 31 F.3d 441, 444-45 (7th Cir. 1994).

considered decision, finding Mr. Aguirre credible and deserving of asylum and withholding. Pet.App. 28a. The Board nowhere contested the IJ's finding that Mr. Aguirre was credible, nor was there any basis on which to contest it. Yet the BIA rejected and recharacterized Mr. Aguirre's testimony. In subtle but significant ways the BIA impugned Mr. Aguirre's credibility without conceding it was doing so or providing any reasonable basis.[12] The BIA implicitly but never explicitly rejected the IJ's finding that no civilians were hurt, that Mr. Aguirre's actions were not criminal but political, and that they were necessary and appropriate in the context of Guatemala in the late 1980s and early 1990s. The BIA's decision does not merit heightened deference. *See Cordero-Trejo v. INS*, 40 F.3d 482, 487 (1st Cir. 1994) (denial of asylum based on negative credibility finding unsupported by the record, reversed).

The BIA's decision here also does not merit heightened deference because it was cursory and poorly reasoned. The INS asks for deference to the "the Attorney General's" undertaking "the context-specific and often sensitive determination of whether an alien who engaged in criminal conduct abroad should be granted safe haven in this country." Pet.Br. at 15. Mr. Aguirre agrees that the Attorney General should undertake a context-specific and sensitive determination of his case, including consideration of his desire for a safe haven. But the BIA did nothing of the kind here. Its entire "consideration" of the merits of his eligibility for withholding was one cursory

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[12] For example, the BIA referred to the government's "seeming inaction" in failing to investigate student deaths and disappearance. There was ample evidence in the record that the Guatemalan government not only did not investigate student deaths and disappearances but also may have been complicit in them. *See also*, Brief of Amici Curiae Massachusetts Law Reform Institute, et al., filed with this Court in this case.

paragraph that said nothing of the context of his actions or his need for a safe haven. Pet.App. 18a.[13]

The INS brief notes that the question whether there are "serious reasons for considering" that certain acts are serious and nonpolitical is largely factual. Pet.Br. at 41. It is true that assessing this question involves applying the facts to the legal standards, but this is precisely what the BIA's decision did not do. The BIA's decision was devoid of factual analysis of whether there are "serious reasons." Tellingly, the INS fails to cite to any place in the BIA decision where the Board considered whether there were "serious reasons" and explained what those "serious reasons" might be.

The BIA decision also is not entitled to deference because the BIA failed to apply its own precedent in

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[13] Numerous circuit court cases have criticized and reversed the BIA for the poor quality of its decision-making and faulty reasoning and analysis. *See Martinez-Benitez v. INS*, 956 F.2d 1053, 1055 (11th Cir. 1992) (reversing BIA for failing to evaluate the nature and underlying circumstances of the applicant's conviction before denying asylum); *Marquez v. INS*, 105 F.3d 374, 378 (7th Cir. 1997) (faulting BIA for disorganization of its opinion and "twisted strands" of reasoning; BIA must announce its decision in terms sufficient to enable a reviewing court to perceive it has heard and thought and not merely reacted); *Espinoza v. INS*, 991 F.2d 1294, 1300-01 (7th Cir. 1993) (BIA's decision rested on nothing but speculation without evidence to support it; the BIA relied on an incomplete record); *Davila-Bardales v. INS*, 27 F.3d 1, 5 (1st Cir. 1994) (BIA departed significantly from prior unpublished decisions treating the identical issue); *Diaz-Resendiz v. INS*, 960 F.2d 493, 495, 497-98 (5th Cir. 1992) (BIA decision departed from established precedent without a reasoned explanation; BIA failed to consider meaningfully all relevant factors, or sufficiently articulate its reasons); *Salameda v. INS*, 70 F.3d 447, 449 (7th Cir. 1995) (the opinions rendered by the INS's judicial officers, including members of the BIA, often flunk minimum standards of adjudicative rationality).

assessing whether any alleged crime was "nonpolitical." Specifically, the BIA did not apply the McMullen and Handbook test.[14] It failed to consider Mr. Aguirre's offenses in relation to his declared political objectives, including whether the acts were committed with genuine political motive rather than for personal gain. The BIA also did not consider whether there was a close and direct causal link between any crime committed and its alleged political purpose and object, nor whether the acts committed were of an "atrocious nature."[15]

As so often, particularly in unreported decisions the BIA failed to consider relevant facts and ignored applicable law.[16]

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[14] *McMullen*, 19 I&N Dec. 90, 97-98 (1984); Handbook ¶ 152. The INS refers to the Handbook as a "foreign" source, Pet.Br. at 16, but this Court has said "the Handbook provides significant guidance." *Cardoza-Fonseca*, 480 U.S. at 439, n. 22. Numerous BIA decisions rely on the Handbook as their authority. Cases just in the last decade in which the BIA majority relied on the Handbook include: *Matter of N – M – A –* , Int. Dec 3368 at 11, 16 (BIA Oct. 21, 1998); *Matter of Y – B –* , Int. Dec. 3337 (BIA 1998); *Matter of S – M – J –* , Int. Dec. 3303 (BIA 1997); *Matter of S – P –* , Int. Dec. 3287 (BIA 1996); *Matter of H –* , Int. Dec. 3276 (BIA 1996); *Matter of R –* , 20 I&N Dec. 621, 625 (BIA 1992); *Matter of Dass*, 20 I&N Dec. 120, 125 (BIA 1989); *Matter of Fefe*, 20 I&N Dec. 116, 118 (BIA 1989); *Matter of Chen*, 20 I&N Dec. 16, 19 (BIA 1989).

[15] The Court of Appeals properly pointed out the BIA's errors, but did not itself make a final determination on Mr. Aguirre's application. The INS is simply wrong when it says that the Court of Appeals expanded the availability of this relief. It did not even approve or direct the approval of Mr. Aguirre's application. All applicants, including Mr. Aguirre, must establish every element of eligibility. Nothing in the Court of Appeals' decision changes that fact.

[16] Many researchers and commentators have criticized the BIA for issuing decisions influenced by politics or foreign policy considerations. *See* U.S. Gen. Accounting Office, *Asylum:*

Uniform Application of Standards Uncertain – Few Denied Applicants Deported 2-4 (1987) (concluding that immigration agencies failed to apply uniform standard in evaluating whether applicant established "well-founded fear of persecution" and that asylum decisions are not always documented); D. Smith, *A Refugee By Any Other Name: An Examination of the Board of Immigration Appeals' Actions in Asylum Cases*, 75 Va. L. Rev. 681, 711-712 (1989) (examining published and unpublished BIA asylum decisions issued between January 1987 and December 1987 and noting the "striking" evidence of "apparent political biases"); K. Johnson, *A "Hard Look" at the Executive Branch's Asylum Decisions*, 1991 Utah L. Rev. 279, 384-50 (arguing that evidence exists that executive branch is influenced by President's foreign policy in deciding asylum claims); *Matter of B –* , Int. Dec. 3251 (BIA 1995) (Vacca dissenting) (Afghan mujahidin supporter's asylum story is neither plausible nor believable and was unsupported by sufficient probative evidence; IJ's adverse credibility finding should have been accepted by BIA majority); *Matter of Salim*, 18 I&N Dec. 311, 319 (BIA 1982) (Vacca dissenting) (anticommunist Afghan granted withholding – but not asylum – despite absence of "a single item of probative, objective evidence" to corroborate his story); *ABC v. Thornburgh*, 760 F. Supp. at 799 (stipulated order approving class action settlement agreement, providing for *de novo* asylum adjudication of Salvadoran and Guatemalan class members' applications; Attorney General agreeing that foreign policy considerations are not relevant and should not be considered in determining applications for asylum; and that an individual is from a country whose government the United States supports or with which it has favorable relations is not relevant; nor whether the United States government agrees with the political or ideological beliefs of the individual).

IV. THERE IS A CORRECT STANDARD FOR EVALUATING THE SERIOUS NONPOLITICAL CRIME EXCEPTION, AND THAT STANDARD WAS APPLIED BY THE IJ AND COURT OF APPEALS.

A. *Chevron* Does Not Require Heightened Deference if a Court is Engaged in Pure Statutory Construction.

The judiciary is the final authority on issues of statutory construction. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n. 9 (1984); *Cardoza-Fonseca*, 480 U.S. at 446-47. Although reviewing courts should uphold reasonable and defensible constructions of an agency's enabling Act, they must not rubber-stamp administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. *Federal Labor Relations Authority v. Aberdeen Proving Ground*, 495 U.S. 409, 414 (1988), (internal quotations and elipses omitted), *citing Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 97 (1983).

This Court has long held that courts must strive to interpret domestic legislation in a way that is consistent with international obligations. *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). Domestic law may supersede international obligations only by express abrogation, *Chew Heong v. United States*, 112 U.S. 536, 538 (1884) or by subsequent legislation that irrevocably conflicts with international obligations. *Reid v. Covert*, 354 U.S. 1, 18 (1957).

Here, the INS's interpretation of the serious nonpolitical crime provision is contrary to the central purposes of the Convention and Protocol, which is to assure that nations not return an alien to a country where his or her life or freedom would be threatened on account of one of the enumerated reasons. *Cardoza-Fonseca*, 480 U.S.

at 429.[17] It is clear from the legislative history of the 1980 Refugee Act that Congress' primary purpose was to bring United States refugee law into conformance with the 1967 Protocol. *Id.* at 436.

Congress has not expressed any intention to renege on the international obligations assumed when it acceded to the 1967 Protocol. To the contrary, since the United States acceded to the Protocol in 1967 and Congress enacted the Refugee Act in 1981, Congress signed the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[18]

If the meanings of "nonpolitical" or "serious" or "serious reasons" or the other terms in § 1253(h)(2)(C) are not clear on their face, the courts appropriately construe their meanings, employing traditional tools of statutory construction. *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 212-13. The task of defining what is a political offense is left to the judiciary. In the *Matter of the Extradition of Francisco Pazienza*, 619 F. Supp. 611, 619 (S.D.N.Y. 1985). In this case, those tools include the words employed by Congress together with such resources as the Convention, Protocol, and Handbook, and the United Nations travaux preparatoires. Also, in this setting, where international law comes into play, the guidance and interpretation of refugee law publicists is helpful.

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[17] *See*, Brief of Amicus Curiae Lawyers Committee for Human Rights and Brief of Amicus Curiae United Nations High Commissioner for Refugees, filed with this Court in this matter.

[18] The Torture Convention was opened for signature on Feb. 4, 1985, G.A. Res. 39/46, 39 UNGAOR Supp. No. 51 at 197 U.N. Doc. A/Res/39/708 (1984), reprinted in 23 I.L.M. 1027 (1984), modified in 24 I.L.M. 535 (1985). The Senate adopted its resolution of advice and consent on October 27, 1990.

B. The Statutory Standards for Analyzing The Serious Nonpolitical Crime Exception Must Be Interpreted Consistently with Congress' Intent in Enacting § 1253(h), That is, To Provide Protection to People Fleeing Prosecution, Not to Reward or Punish.

The unambiguously expressed intent of Congress in enacting § 1253(h) was to conform United States law to the Convention and Protocol, thus assuring that those facing a clear threat to their life or freedom would not be returned to face that threat. *Stevic*, 467 U.S. at 416-17; *Cardoza-Fonseca*, 480 U.S. at 429. Congress' intent also was that refugee determinations not be based on or influenced by ideological, geographical, or foreign policy considerations. *Stevic*, 467 U.S. at 422 (the Refugee Act eliminated the ideological and geographical restrictions on admission of refugees); *see also, ABC v. Thornburgh*, 760 F. Supp. at 799.

Asylum and withholding are "prophylactic protection" for those who might face future persecution. They are "designed not to remedy the past, but to protect those who might suffer future persecution." *In re N – M – A –*, Int. Dec. 3368 (BIA Oct. 21, 1998 at 8, *quoting Marquez v. INS*, 105 F.3d 374 (7th Cir. 1997). In other words, asylum and withholding are not to be used as a reward for favorable behavior nor as a punishment for unfavorable behavior.

A grant of withholding to an eligible person is, of course, mandatory. *Stevic*, 467 U.S. 421, n. 15. The exceptions to the withholding statute are to be treated as exceptions; they should be narrowly construed.[19] As the

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[19] J. Hathaway, *The Law of Refugee Status*, 189 (1991) (because these clauses are to be applied only in relation to persons who otherwise present a prima facie need for protection, they ought reasonably to be strictly construed); Handbook ¶ 149 (considering the serious consequences

INS concedes, the exceptions apply to applicants who already have demonstrated not just that they will be persecuted, but that there is a high likelihood that their life or freedom will be threatened if they are forcibly returned.

The serious nonpolitical crime exception has two purposes: 1) to avoid granting refugee status to persons who might jeopardize the internal security of asylum countries,[20] and; 2) to prevent abuse by fugitives from justice.[21]

The purposes of the exception are not furthered by applying it to deport Mr. Aguirre to Guatemala. Both the IJ and the BIA expressly held that he is a not a terrorist or a danger to the community. Cert.Pet.App. 17a; 30a-31a. He is and has been law-abiding in the United States; he presents no danger to the State of Nevada or the United States.[22] The IJ also expressly found that Mr. Aguirre did not flee Guatemala to escape prosecution. ("There is no evidence of Government investigations, charges, or prosecution.") Cert.Pet.App. 30a.

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exclusion for the person concerned, the interpretation of this and the other exclusion clauses must be restrictive).

[20] Hathaway at 214, Handbook ¶ 51. *See also, Frentescu,* 18 I&N Dec. 244 (BIA 1982) (the most important factor when considerating this exception is whether the applicant will be a danger to the community).

[21] A. Grahl-Madsen, *The Status of Refugees in International Law* 290 (1966); *see also* Hathaway at 221 (Convention Article 1(F)(b) disallows the claims of persons who seek to escape legitimate criminal liability).

[22] That Mr. Aguirre has not committed "arson" or any crime in this country is additional evidence that the actions in which he participated in Guatemala were context-specific and political.

C. In Evaluating a Case Involving a Potential Serious Nonpolitical Crime, the "Serious Reasons" Requirement Applies to Each Element and The INS Carries the Initial Burden Of Proof.

When determining whether the serious nonpolitical crime exception applies, the IJ, the BIA and reviewing courts must separately examine each element of the exception. There must be "serious reasons" to find that each element has been met.[23] That is, there must be serious reasons *for considering* that all the statutory terms have been established and that the exception applies: there must be serious reasons for considering that the applicant *committed* a crime; there must be serious reasons for considering the crime was *serious;* and there must be serious reasons for considering that the crime was *nonpolitical.*

The initial burden of proof regarding each element is on the INS. The INS concedes that a finding that there are "serious reasons for considering" requires that there be probable cause. Pet.Br. at 20, n. 9. The INS must make out a prima facie case that all of the elements of § 1253(h)(2)

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[23] Scholars have questioned whether the serious nonpolitical crime exception should permanently bar a person from admission as a refugee. Grahl-Madsen at 291 and citation therein; Goodwin-Gill at 103. Mr. Aguirre participated in the challenged conduct beginning in 1989, when he was 19 years old. As § 1253(h)(2)(C) makes the bar permanent in United States law, there should be serious reasons for applying it.

A withholding case has many analytical, legal, and ethical similarities to a capital sentencing case. This Court continues to hold that in the selection phase of a capital case, where the sentencer is determining whether to impose a death sentence on an eligible defendant, there is a need for a broad inquiry into all relevant mitigating evidence to allow an individual determination. *Buchanan v. Angelone,* 522 U.S. 269, 139 L.Ed.2d 702, 709 (1998).

are met. *See*, regarding the political offense exception under extradition law, *Quinn v. Robinson*, 783 F.2d 776, 783 (9th Cir. 1986), *citing Glucksman v. Henkel*, 221 U.S. 508, 512 (1911) (there must be a showing of probable cause sufficient to justify committing the accused for trial in the requested nation as if the offense had been committed there).

The INS says that the burden is on the applicant to show that the exception does not apply. Placing this burden on the applicant is inconsistent with the mandatory nature of withholding. *INS v. Doherty*, 502 U.S. 314, 332 (1992) (Scalia, concurring and dissenting) (because of the mandatory nature of withholding, the Attorney General's power to deny withholding claims differs significantly from the broader authority to administer discretionary forms of relief, such as asylum and suspension of deportation).

Further, placing the burden of proving the exception does not apply on the applicant – aside from the logical difficulty of proving a negative – also would be inconsistent with the purpose and structure of the withholding statute. The overriding purpose of withholding is to protect people fleeing a near-certainty of death or very serious harm. The applicant is, after all, a person who otherwise would have a perfect claim to withholding of deportation. *See* Grahl-Madsen at 291. The withholding statute was not intended to operate as punishment or retribution.

The withholding provisions are structured so that the § 1253(b)(2) exceptions apply only after § 1253(b)(1) eligibility is considered; they are not a threshold to proving eligibility.[24] Congress could have written these grounds as threshhold exclusions, but did not.

The INS cites 8 CFR 208.16(c)(3) (1995) as placing the burden of proof on the applicant to show this exception

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[24] As the statute says: "(2) Paragraph (1) shall not apply to any alien if. . . . "

does not apply.[25] The regulation says, however: "If the evidence *indicates*" that one or more of the exceptions apply, then the applicant has the burden to prove that the ground does not apply (emphasis added). That is, before the burden shifts to the applicant, the INS must adduce sufficient proof to indicate that each element of the exception applies. *Woodby v. INS*, 385 U.S. 276 (1966).

Any interpretation that placed the burden entirely or initially on the applicant would be inconsistent with the purpose and structure of the statute. A regulation cannot contradict its authorizing statute. *Brown v. Gardner*, 513 U.S. 115, 122 (1994) (regulation conflicting with the statute exempts courts from any obligation to defer to it). For the regulation to be consonant with the statute, the initial burden must be on the INS to establish a prima facie case with respect to each element of the exception.

Where the initial burden is placed is pivotal. The INS did not establish a prima facie case that each element of the serious nonpolitical crime exception applies here. Because the INS did not meet this burden, the exception does not apply. The IJ expressly found, after listening to Mr. Aguirre's testimony, observing him, and reviewing his application and attachments, that none of the elements was established. The IJ found that Mr. Aguirre was not being sought for commission of any "crime" in Guatemala, Cert.Pet.App. 30a; that the actions in which Mr. Aguirre was involved were political, not criminal, and were not "serious" in the context in which they occurred. *Id.* at 30a-31a. If deference to the trier of fact is to mean anything, it is that the burden to show each of the elements was not met by Mr. Aguirre's testimony.

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[25] The INS also cites the current version of the regulation, 8 CFR 208.16(c)(2) (1998). It is essentially identical to the 1995 regulation.

D. The Threat to Life or Freedom the Applicant Faces is Properly Factored Into the Exception When the Adjudicator is "Considering" Whether There Are "Serious Reasons."

When the serious nonpolitical crime exception was drafted into the Convention, the drafters anticipated that the risk of persecution would be considered. The travaux preparatoires provide:

> States which received a request for the extradition of a refugee who had committed a crime of no great consequence from the very government that was likely to persecute him, would be faced with a very difficult decision. On the other hand, States could not be expected to grant asylum to persons committing capital crimes merely because they happened to be exposed at the same time to relatively minor dangers on account of some unimportant political activity. A proper balance must be struck between all the considerations involved.[26]

The travaux preparatoires also document that the delegate from the United States argued in favor of adopting a provision that would permit state discretion to admit or refuse serious criminals, rather than a mandatory exclusion clause. Hathaway at 214, n. 156.

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[26] Hathaway at 224 citing Statement of Mr. Larsen of Denmark, U.N. Doc. A/CONF.2/SR.24, at 13, July 17, 1951. *See also*, Goodwin-Gill at 102 n. 125; 105, n. 138 (the Convention drafters knew "it would be necessary to balance the seriousness of the crime against the degree of inconvenience or persecution feared;" "At the Conference of Plenipotentiaries, the President, Mr. Larsen, said that it would be for the country of refuge to strike a balance between the offences committed and the extent to which the fear of persecution was well-founded.") *See also* briefs of Amici Curiae United Nations High Commissioner for Refugees and Lawyers Committee for Human Rights.

The Handbook's ¶ 156 balancing test thus incorporates and is consistent with the intent of the Convention's drafters. They understood that Article 1(F)(b) would sometimes necessitate a balancing of the risk of persecution against the seriousness of the crime. The Handbook memorializes and explains how that test is to be applied to be consistent with the Convention and Protocol.[27]

Hathaway has described this as perhaps the most important factor when considering the serious nonpolitical crime exception:

> [T]he risks associated with exclusion from refugee status must not outweigh the harm that would be done by returning the claimant to face prosecution or punishment. Even though a claimant may be a serious criminal, it is possible that the heinous nature of the persecution anticipated in her state of origin counters the extradition-derived logic of her return.[28]

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[27] The travaux answer the INS's charge that the Handbook was non-contemporaneous with the Refugee Act. *See also*, Memorandum from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, INS. ("We assume that Congress was aware of the criteria articulated in the Handbook when it passed the Act in 1980, and that it is appropriate to consider the guidelines in the Handbook as an aid to construction of the Act.") Reprinted in *M – A – v. U.S. INS*, 899 F.2d 304, 321 (4th Cir. 1990).

[28] Hathaway, 227, citing A. Grahl-Madsen at 298 ("if, for political reasons, a person is threatened with certain death, imprisonment for life, serious bodily harm or the like upon his eventual return . . . it would, indeed, seem equitable to recognize him as a refugee, even if he were considered guilty of a truly serious non-political crime.") *See also, Matter of Gonzalez*, 19 I&N Dec. 682, 687 (BIA 1988) ("If, for instance, an individual faced the possibility of death, or torture and inhuman treatment, would we not want to know this before deciding to deny asylum in discretion, even where the individual has

It is not that the seriousness of the crime varies with the likelihood or the degree of persecution. Nor does a past act become more or less political when future risk is considered. Rather, it is simply as the Handbook says, that if the risk of persecution is very high, and the threatened persecution very great, a crime must be very grave in order for United States to expel the refugee from this country. Handbook ¶ 156.[29]

Even among eligible withholding applicants, there is a range of fear and a range of harm that may befall them. The Handbook's standard anticipates this range, by providing that the persecution feared may be less or more severe, and that the balance is to be weighed accordingly. In light of the purposes of the Convention, the Protocol, and the Refugee Act, if the risk of persecution is high enough, disqualification based on a crime that is not very grave is inappropriate. Put in real terms, if a refugee will be forcibly expelled to face death, torture, or severe mistreatment because of his or her political activities, we should ensure that the crime that justifies expulsion was very serious indeed.

The decision-maker applies the balancing in its logical place, in the *consideration* of whether this withholding exception applies at all. This is where the Court of Appeals correctly interpreted and placed the "balancing." As the Court said, "Mr. Aguirre could well be found to be

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committed a particularly serious offense?" Heilman, concurring).

[29] *See also,* Handbook ¶ 169; "A deserter or draft-evader may also be considered a refugee if it can be shown that he would suffer disproportonately severe punishment for the military offense . . . [or] if he has a well-founded fear of persecution on these grounds above and beyond the punishment for desertion." *Matter of A – G –* , 19 I&N Dec. 502 (BIA 1987), recognizing this exception if there would be disproportionate or severe punishment upon return, and citing Handbook.

in danger of losing his life if returned to Guatemala and therefore should be excluded for his crimes only 'for the most serious reasons.' " *Citing* Goodwin-Gill at 107, Cert.Pet.App. 7a.

The word "consider" is not defined in the INA, but the dictionary definitions support the view that to "consider" is an active assessment process, requiring the decision-maker to evaluate and apply many factors: "To fix the mind on, with a view to careful examination; to examine; to inspect. To deliberate about and ponder over. To entertain or give heed to." BLACKS LAW DICTIONARY, 6th ed. 1990. Also, "To think carefully about, especially in order to make a decision; contemplate; ponder; to think deliberately or carefully; to reflect." RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY (1997).

The IJ's discretion is most appropriately exercised here, where he or she listens to and observes the witnesses, weighs the evidence and determines whether to apply this exclusion in the applicant's case. Consequently, here heightened deference to the IJ's assessment is most appropriate. And it was here where the BIA rejected the IJ's assessment, without so much as a word of explanation.

It is true that the words "balancing test" are not in the statute.[30] The BIA routinely applies the Handbook's other balancing tests, however, even though the words "balancing test" do not appear in those sections of the statute. Most conspicuously, in interpreting this very exception, the BIA applies the Handbook's ¶ 152 "balancing test" – and did so in this very case – although the statute is equally silent. *See McMullen,* 19 I&N Dec. 90, 97-98 (the political aspect of the offense must outweigh

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[30] The INS argues for a "proportionality" test in applying this exception, although that test is nowhere found in the statute. The courts apply a proportionality test to the political offense exception in extradition cases, just as the Court of Appeals here applied a balancing test to the political offense exception in this refugee context.

its common-law character); Cert.Pet.App.18a "[T]he criminal nature of the respondent's acts *outweigh* their political nature." (Emphasis added). *See also* Handbook ¶ 169 and *Matter of A – G –* , 19 I&N Dec. 502, 506.[31]

Considering the risk of persecution would not be "counting" the persecution twice. Under the INS's framework, the risk of persecution would not be counted even once. The BIA expressly did not reach the question of Mr. Aguirre's statutory eligiblity for withholding and scarcely mentioned his fear that he would be killed if he is expelled to Guatemala.

The IJ had no hesitation in finding that Mr. Aguirre met the high standard of proving a clear probability that his very life was at risk if he were forcibly expelled to Guatemala. Cert.Pet.App. 31a-32a. "Considering" that grave risk in the context of the political, social, and military situation in Guatemala, the IJ found that the activities in which Mr. Aguirre was involved in Guatemala were not sufficiently serious to disqualify him. This finding was, of course, due significant deference, but the BIA's decision disregards it without explanation or justification.

E. There Must Be "Serious Reasons" For Considering That Any Crime Committed Was "Nonpolitical" and "Serious".

This nation's immigration statutes have codified its longstanding policy that individuals should not be excluded on the basis of having committed "political

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[31] The BIA frequently applies balancing tests in other contexts, as a matter of statutory interpretation, although those statutory provisions do not authorize or require a balancing test. *See Matter of Marin*, 16 I&N Dec. 581, 584 (1978) (in considering waiver under former INA § 212(c), BIA balances favorable and unfavorable factors; *Matter of Mendez-Moralez*, Int. Dec. 3272 (BIA 1996) (reaffirming *Marin*, applying balancing test to application for § 212(h) waiver).

offenses." This policy was first codified in our immigration laws in 1875, and continues in force today.[32]

The BIA employs the Handbook's analysis for determining whether a crime is "nonpolitical." *McMullen*, 19 I&N Dec. at 97-98, employing Handbook's ¶ 152 test. Under that analysis, the decision-maker must consider:

> 1) the act's nature and purpose, i.e., whether it was committed from genuine political motives and not merely for personal reasons or gain;
> 2) whether there is a close and direct causal link between the crime committed and its alleged political purpose and object;
> 3) whether the political element outweighs the common-law character.

The INS does not dispute the IJ's finding that Mr. Aguirre's actions in Guatemala were politically motivated. There was no personal gain. There was indeed a close and direct causal link between the demonstrators'

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[32] The Act of March 3, 1875 marked the first time federal law sought to exclude criminals from its borders. That section stated, *inter alia*, "[i]t shall be unlawful for . . . persons who are undergoing a sentence for conviction in their own country of felonious crimes other than political [offenses] or growing out of or the result of such political offenses," to be barred from immigrating to the United States. Act of March 3, 1875, § 5 (18 Stat. 477) reprinted in Laws Applicable to Immigration and Nationality, U.S. Dep't of Justice, 1953, at 209-10. The Act of May 6, 1882 (22 Stat. 58); the Act of March 3, 1891 (26 Stat. 1084); the Act of March 3, 1903 (32 Stat. 1213); the Act of February 20, 1907 (34 Stat. 898); the Act of March 26, 1910 (36 Stat. 263); and the Act of 1917, § 3, 2nd proviso (39 Stat. 874) all contain a similar provision exempting people convicted of "political offenses" from the criminal bar to admission.

Several sections of the current INA exempt those who committed or were convicted of political crimes: §§ 1101(a)(43)(F) (aggravated felony, crime of violence); 1182(a)(2)(A)(i)(1) (crime involving moral turpitude); 1182(a)(2)(B) (multiple criminal convictions).

targeting the buses and shops and the causes for their protests.[33] The IJ found that the criminal nature of the actions did not outweigh their common-law character. The BIA conducted its own balancing and reached a different result, but the BIA's balancing was flawed.

The BIA found that the ES's actions were "disproportionate."[34] Proportionality must be measured in context; here the Board strikingly ignored the context of the ES's protest.[35] The BIA noted the violent "atmosphere" in Guatemala, but instead of incorporating that awareness into its consideration of the conditions in which Mr.

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[33] *See* Amici Curiae brief filed by Massachusetts Law Reform Institute et al. in this case, describing the significance of bus fare increases to students and workers in Guatemala and the practical limitations on nonviolent political expression. The ES's concern was not economic; the bus fare increases caused severe societal disruptions, as would proportionally large increases in a vital service in this country.

[34] The term "disproportionate" is not found in § 1253(h)(2)(C) any more than is the word "balance." But the BIA and courts do consider the proportionality of an act when determining whether the political offense exception applies. *See, Eain v. Wilkes*, 641 F.2d 504, 515 (7th Cir. 1981). The "proportionality" issue connects the "nonpolitical" question with the "serious crime" question. Analytically, a crime does not become less political if it is more serious. It retains its political character even if the use of force was disproportionate to the political goals or if it is "atrocious." But courts have been reluctant to apply the political offense exception if the crime was atrocious or disproportionate, and have seemed to hold that some crimes are too serious to be political. These cases' faulty analysis blurs the line between the "serious" element and the "nonpolitical" element. *See McMullen*, 788 F.2d 596-98; *Eain*, 641 F2d 520-21. The BIA decision in this case suffers from the same defect.

[35] *See* Amici Curiae brief filed in this case by the Massachusetts Law Reform Institute et al., discussing the political and social context in which these protests occurred.

Aguirre found himself, the BIA faulted him for taking actions that were not completely peaceful. Certainly, as the Court of Appeals noted, the demonstrators' actions would be objectionable in this era in the United States, but that is not the correct standard.[36] The withholding statute does not require applicants to be pacifists or to engage only in nonviolent protest. The BIA has conceded, in cases arising in other countries, that violent actions may be the only option for people seeking to change the political structure of their governments. *Matter of Izatula*, 20 I&N Dec. 149, 153-54 (BIA 1990), *citing Dwomoh v. Sava*, 696 F. Supp. 970, 979 (S.D.N.Y. 1988); *Matter of Rodriguez-Majano*, 19 I&N Dec. 811, 815 (BIA 1988) (activities such as burning of cars and the destruction of other property is not persecution of others). The BIA cannot, *sub silentio* or in effect, impose a new standard of nonviolence for withholding applicants.

Neutrality in the refugee context, at least as much as in the extradition context, demands more than that the decision-maker remains uninfluenced by the identity of the requesting country or the country of origin. The decision-maker also must remain neutral on the underlying political conflict in that other country and the "legitimacy" of the political objectives of the dissenters. *See,*

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[36] *See In re Doherty*, 599 F. Supp. 270, 273, n. 2, 275 (S.D.N.Y. 1984) (that violence was used during the commission of a political crime is not dispositive in an extradition case; "at the time of the American Revolution, there were a large number of colonists who. . . . regarded the thought of armed opposition to the Crown as both treasonous and abhorrent," *citing* authorities); *Quinn v. Robinson*, 783 F.2d 776, 808 (9th Cir. 1986) (construing the political offense exception in a subjective and judgmental manner to exclude all violent political conduct of which courts disapprove would necessarily exclude some forms of internal revolutionary conduct and thus run contrary to the exception's fundamental purpose.

Quinn v. Robinson, 783 F.2d 776, 804 (9th Cir. 1986). Extradition law and refugee law will cease to function if particular judges, or the BIA, decide the political offense exception by applying their own political preferences to the internal struggles of refugees or persons fleeing political prosecution. At the same time, a finding that the political offense exception applies does not require or connote any "recognition" or approval of the resisters as a legitimate political group. *Eain v. Wilkes*, 641 F.2d at 515.

The Court of Appeals was correct that in determining "proportionality," it is appropriate to consider such factors as the necessity for the actions and their success.[37] The Court did not make "necessity" and "success" new threshold elements but rather, said they should be considered, in an appropriate case, as part of this equation. If a group repeatedly takes actions that have not been successful to their political goals in previous attempts, their conduct undermines the claim that those actions were necessary to achieve their political goals. In that case, the actions are disproportionate to achieving the political goals, and this fact raises the inference that some other goal existed. In other words, necessity and success are relevant in appropriate cases, but they are not dispositive.

This Court followed this line of analysis in *Ornelas v. Ruiz*, 161 U.S. 502, 510-11 (1896), in determining whether the crimes in that case were nonpolitical. The decisive factor was this statment of a State Department official who reviewed the extradition request:

> "The idea that these acts were perpetrated with bona fide political or revolutionary designs is

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[37] "Where the motivation is genuine, the strategy credible, and the incidental harm tolerable in relation to the goal sincerely pursued, it is reasonable to view the action as more fundamentally political than criminal, and hence to access the refugee claim on its merits." Hathaway at 174, footnotes omitted.

> negatived by the fact that immediately after this occurrence, though no superior armed force of the Mexican government was in the vicinity to hinder their advance into the country, the bandits withdrew with their booty across the river into Texas."

That is, fleeing across the border was not necessary for the goal of fighting the Mexican army, nor would it have been a successful strategy.

The INS's concern that there may be foreign policy implications from a finding that violence was "necessary" in a certain country flatly contradicts the Attorney General's agreement, in conformance with the Convention, Protocol, and Refugee Act, that foreign policy considerations are to play no role in witholding or asylum determinations. *ABC v. Thornburgh*, 760 F. Supp. at 799.[38]

Regrettably, political protest sometimes involves civilians, as here. There is no rule, nor could there be, that protest involving civilians is nonpolitical. The INS attempts to create the appearance that the deciding factor in *Ornelas v. Ruiz* was that there were civilian victims. On the contrary, that the victims were civilians was only one of many factors mentioned by the Court, and it was not pivotal. 161 U.S. at 510-11.

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[38] The INS's suggestion that consideration of the necessity and success of past conduct, as part of a proportionality evaluation in a withholding claim, will incite further violence by others in that country scarcely merits response. The notion assumes that political protesters in distant lands gear their conduct to eventual approval of their eventual petitions for relief of deportation. The further suggestion that the protestors should have burned the buses when they were off duty manifests the INS's insensitivity to the purpose of these protests and the limitations on peaceful protest in Guatemala. *See* brief of Amici Curiae, Massachusetts Law Reform Institute, et al.

This case is easily distinguishable from *Eain v. Wilkes*, 641 F.2d 504 (7th Cir. 1981), *cited* by the INS. *Eain* concerned the intentional and purposeful murder of civilians through random bombing. *Id.* at 521. The perpetrators' goal was to cause as much death and destruction to civilians as possible. The bomb was placed in a "teeming market area" of Israel, and apparently no warning was given. *Id.* at 507, 509. The court said:

> "the indiscriminate bombing of a civilian populace is not recognized as a protected political act even when the larger 'political' objective of the person who sets off the bomb may be to eliminate the civilian population of a country." *Id.* at 521.

Here, any actions against civilians were intended to clear them from buses before the buses were burned, thus preventing greater harm.[39] The evidence was uncontroverted that the ES did not target civilians. Their actions were intended to and did prevent injuries to civilians. Cert.Pet.App. 31a (IJ finding that "No one was ever hurt;" AR 93 (Mr. Aguirre explaining that no one was hurt during the bus burnings because the SE would help the people leave the bus before it was burned).

The INA and case law distinguish between "legitimate" political crime and "illegitimate" political crime, that is, terrorism. Both the IJ and BIA expressly rejected the government's argument that Mr. Aguirre's actions constituted terrorism or that he was a danger to the community. Cert.Pet.App. 17a; 31a. By gross and inflammatory exaggerations and unsupported analogy, the INS attempts to resurrect this rejected argument *sub silentio*.

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[39] Further, the Court of Appeals in *Eain* was concerned to prevent terrorists fleeing to this country to avoid having to answer to anyone anywhere for their crimes. *See* 641 F.2d at 520. There is no such concern in this case: Mr. Aguirre was not a terrorist and was not fleeing to avoid prosecution.

The Court of Appeals correctly distinguished this case from *McMullen*. There, the BIA and the Court of Appeals found that McMullen's active participation in terrorist activities directed at civilians was not within the political offense exception. 788 F.2d at 595-596; 19 I&N Dec. 90, 97-99. The PIRA itself was "unquestionably" a terrorist organization. 788 F.2d at 597. McMullen's involvement in the terrorist use of explosives and his participation in the PIRA's campaign of violence randomly directed against civilians were atrocious acts out of proportion to the asserted political goal. *Id.* at 596. He had served three years in prison before he entered the United States, *id.* at 593, and there was an outstanding warrant for McMullen's arrest for attempted murder, among other charges. *McMullen v. United States*, 953 F.2d 761, 763 (2d Cir. 1992) *rev'd on other grounds*, 989 F.2d 603 (2d Cir. en banc 1993).

There Must Be Serious Reasons – Meaning Probable Cause – for Considering That Mr. Aguirre Personally Committed a Crime.

The IJ expressly rejected the INS's argument that Mr. Aguirre was a criminal. He noted that there was no evidence of Guatemalan government investigations, charges, or prosecution of Mr. Aguirre. Pet.App. 30a. The threats against Mr. Aguirre by the government and guerrillas were based upon political grounds, the IJ found. *Id.*

Although one would not know this from reading the INS's brief, in its three-paragraph discussion of this question, the BIA did not say that Mr. Aguirre had committed arson or any specified crime. In fact, the BIA did not accuse Mr. Aguirre of having committed a crime at all. Pet.App. 17a-18a. Nor did the BIA discuss Mr. Aguirre's personal culpability, liability, or mens rea.

Without citing an applicable statute or authority, or pointing to any charge or conviction, and ignoring the IJ's express finding that Mr. Aguirre was not guilty of any crimes, the INS accuses Mr. Aguirre of committing arson

in Guatemala. The INS offers no legal analysis to establish that the elements of the crime of arson were met. *See Mabugat v. U.S. INS*, 937 F.2d 426, 431 (9th Cir. 1991) (witholding applicant "admitting" potentially political crime may not have admitted a "crime" at all, as there was no proof of the mens rea necessary to convict).[40]

Further, there must be serious reasons – probable cause – to believe that Mr. Aguirre personally is guilty of a crime. *See Ornelas v. Ruiz*, 161 U.S. at 512; Goodwin-Gill at 106 (attention must be paid to the level of individual responsibility).[41] Mere membership in a rebel group, even one that engages in persecution, is not sufficient to bar a person from relief as a persecutor. *Rodriguez-Majano*, 19

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[40] Arson was defined at common law as the malicious burning of the house of another. BLACK'S LAW DICTIONARY, 6th ed. The Model Penal Code, § 220.1(1), provides that a person is guilty of arson, a felony of the second degree, if he or she starts a fire or causes an explosion with the purpose of: (a) destroying a building or occupied structure of another; or (b) destroying or damaging any property, whether his own or another's, to collect insurance for such loss. *Id.*

Under Federal law, at 18 U.S.C. § 81, arson is committed by someone within the territorial jurisdiction of the United States who:

> willfully and maliciously sets fire to or burns, or attempts to set fire to or burn any building, structure, or vessel, any machinery or building materials or supplies, military or naval stores, munitions of war, or any structural aids or appliances for navigation or shipping.

See United States v. Banks, 368 F. Supp. 1245 (D.S.D. 1973) (for "motor vehicle" to be included within 18 U.S.C. § 81, it would have to be classified as "machinery" but that such classification would raise grave constitutional questions as to vagueness).

[41] Grahl-Madsen emphasized the right of the person subject to the bar to establish his innocence, even in the face of a conviction. Grahl-Madsen at 290.

I&N Dec. at 814-15. It is the effect of the applicant's own actions that is controlling. *Id.*

In this case, all of Mr. Aguirre's pertinent testimony related to the actions of the SE. The BIA did not, of course, address the question of his individual responsibility. Contrast the BIA decision in *McMullen*, where the Board found that McMullen was personally responsible for importing illegal arms shipments and that those guns could be tied directly to the murder, torture, and maiming of civilians. 19 I&N Dec. at 96.

CONCLUSION

The judgment of the Court of Appeals should be affirmed; or the matter should be remanded to the agency for a new merits hearing on Mr. Aguirre's applications for withholding and asylum.

Respectfully submitted,

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*For indentification only

APPENDIX

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In re *JUAN ANIBAL AGUIRRE-AGUIRRE,*	)	IN DEPORTATION PROCEEDINGS
Respondent.	)	A 70 815 341
	)	MOTION TO REMAND

Respondent JUAN ANIBAL AGUIRRE-AGUIRRE, by and through counsel undersigned, hereby moves the Board of Immigration Appeals to remand this case to the Immigration Court for a new hearing on his applications for relief from deportation.

BRIEF PROCEDURAL HISTORY OF THIS CASE

Mr. Aguirre's applications for asylum and withholding of deportation were granted by the Immigration Judge (IJ) after a merits hearing on April 5, 1995. The INS appealed. This Board reversed the decision of the IJ in an unpublished decision filed on March 5, 1996.

Mr. Aguirre petitioned for review to the Ninth Circuit Court of Appeals. That Court reversed the decision of the BIA in a reported decision, 121 F.3d 521 (9th Cir. Aug. 8, 1997). The INS sought rehearing; the Court denied the petition for rehearing on November 6, 1997. The INS filed a petition for certioari [sic] in the United States Supreme Court. That petition was granted on October 5, 1998. The case currently is pending before the Supreme Court, docket number 97-1754. The INS filed its opening brief on December 4, 1998.

WHY A NEW MERITS HEARING IS NECESSARY

A new merits hearing is necessary because the interpreter at Mr. Aguirre's original April 5, 1995 merits hearing made crucial errors in interpretation. Those errors have become pivotal in this case. The errors included misinterpreting Mr. Aguirre's answers and also misinterpreting questions put to Mr. Aguirre, so that, unbeknownst to him, he did not answer the questions asked of him.

To addition to the interpreter's errors, the hearing tape transcription is in error in at least one crucial point. Attached to this motion is a corrected transcript, made by a Federal Court certified interpreter who translated both

Mr. Aguirre's and the interpreter's Spanish. The corrected transcript details the errors made by the original interpreter and the transcriber.

Neither the IJ nor counsel for Mr. Aguirre understood Spanish, consequently they did not realize that the interpreter was making these errors.

In the Supreme Court, the INS has focused its case on Mr. Aguirre's purported conduct in Guatemala, particularly regarding political protests and demonstrations. The issue is whether he committed a serious non-political crime in Guatemala. The questions and testimony that were erroneously interpreted bear directly and crucially on this question. However, in its brief to the Supreme Court the INS has not acknowledged nor addressed the errors in the transcript.

Because the interpreter also erred in the interpreting into Spanish the trial attorney's English-language questions to Mr. Aguirre, it is not sufficient simply to issue a corrected transcript of the same tape. A new, corrected transcript will not permit Mr. Aguirre to answer the questions asked. These are questions that can be heard in English on the tape and that appear, as asked, in the transcript. These are not the questions Mr. Aguirre heard and answered, however. Mr. Aguirre heard and answered the interpreter's incorrect questions.

For example, the trial attorney asked:

> "When you were burning these buses and throwing rocks and things at people did you cover your face with a bandanna or in some other way hide your identity?"

AR at 94 (attached hereto).

The words "and throwing rocks and things at people" were not included in the interpreter's question. The interpreter's question to Mr. Aguirre (translated from her Spanish by the Federal interpreter) was:

> "During the burnings of these buses or the fires that you made did you disguise yourselves or did you cover your faces or use some kind of disguise so that you would not be known?"

Consequently, Mr. Aguirre was not aware that the trial attorney thought (and the written transcript says) he had thrown rocks at people, and did not deny that he had done so.[1] Mr. Aguirre's answer, not surprisingly, did not respond to the rock-throwing allegation. He simply said, "Yes, we would cover our faces."

Again, a few minutes later, the trial attorney's question accused him of throwing rocks at people:

> "The people who were in the stores, did you treat them in a similar fashion that you treated the people on the bus, that is throw rocks at them and hit them with sticks and tie them with ropes in order to get them to go?"

AR 94.

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[1] The trial attorney was under the impression that Mr. Aguirre had said he and his compatriots threw rocks at the people because of an uncorrected interpreting error a few minutes before. Because the interpreter thereafter omitted the parts of the trial attorney's questions that alluded to rock-throwing, Mr. Aguirre never was alerted that the people in the courtroom believed he had thrown rocks, and indeed that the transcript includes those allegations.

Again, in posing the question to Mr. Aguirre, the interpreter omitted the words "throw rocks at them" and her question conveyed to Mr. Aguirre an accusation of less violent conduct:

> "The people who were in the stores, did you treat them in a similar fashion that you treated the people on the bus, that is hitting them with some stick and tying them up with a rope, a lasso?"

Again, the second (and last) opportunity for Mr. Aguirre to deny that he had hit people with rocks was lost because of erroneous interpreting. Mr. Aguirre also may not have perceived the degree of violence he was accused of having committed. His answer was:

> "If they did not try to do anything to us, we would not do anything to them. Because we would explain, for example to the people in the bus, why we were protesting and sometimes they would support us, because we told them it was because of the high fares."[2]

In summary, the hearing interpreter made significant errors of omission and commission. Because this testimony has become pivotal in this case, it is vital that Mr. Aguirre be permitted to understand what he is being accused of and to answer the questions actually asked of him. It is not sufficient, to put it mildly, to deport a person who faces an established threat to his life or freedom when he has not been able to respond to the

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[2] This is the Federal interpreter's corrected interpretation of Mr. Aguirre's answer.

charges against him. Mr. Aguirre's right to due process mandates that a new hearing be held.

CONCLUSION

For the foregoing reasons, and supported by the attached excerpts form the original transcript and the corrected transcript, Mr. Aguirre respectfully moves this Board to remand his case to the IJ for a new merits hearing.

DATED this 14th day of December, 1998.

/s/ Nadine K. Wettstein
NADINE K. WETTSTEIN
Attorney for Mr. Aguirre

CERTIFICATE OF SERVICE

The undersigned hereby affirms that the foregoing Motion to Remand and all attachments were mailed via first class mail, postage prepaid, this 14th day of December, 1998 to the following:

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September 23, 1998

Frank Lorson
Deputy Chief Clerk
United States Supreme Court
One First Street, N.E.
Washington, D.C. 20543

Re: *INS V. AGUIRRE-AGUIRRE*, 97-1754
INS # A 70 815 341

Dear Mr. Lorson:

On behalf of Respondent JUAN ANIBAL AGUIRRE-AGUIRRE, I am lodging with the Court 10 copies of the

attached Affidavit of Certified Court Interpreter. This affidavit responds to the matters Respondent addressed in his Brief in Opposition to the Petition for Certiorari, particularly at footnote 2.

I regret the delay in forwarding this material to the Court. I am serving counsel for the Petitioner with this material today.

In addition, please note my new address and telephone and fax numbers, above. Thank you.

Yours truly,

/s/ Nadine K. Wettstein
Nadine K. Wettstein

CC w/encl: Seth P. Waxman, Solicitor General
Jocelyn M. Wright, Office of Immigration Litigation, Department of Justice

---

AFFIDAVIT OF CERTIFIED COURT INTERPRETER

I, Ron Earnest, do hereby affirm that the following is true and correct, and that the translation that follows is true and accurate to the best of my ability:

I am a professional translator and interpreter who has been certified by the Administrative Office of the United States Court since 1984. I have also been certified to interpret proceedings in the courts of New York, California, and Maryland. I have worked intermittently as a judicial and conference interpreter since 1978. In addition

to working as an independent contractor for the California courts, I have been appointed staff interpreter for the Supreme Court of New York (1982-83), for the United States District Courts for the Southern District of California (1990-92), and for the United States District Courts for the Southern District of New York (1992-93, I left to pursue a law degree). My educational background includes a B.A. from the City College of New York, a Master's degree in Latin American History and Economics from the University of California – Berkeley, and a J.D. from Syracuse University. I am currently a member in good standing of the Maryland State Bar Association, and am licensed to practice law in Maryland.

At the request of Nadine K. Wettstein, Attorney at Law, I reviewed a portion of an immigration hearing tape, and compared the tape to what was purported to be a transcript of that part of the hearing. My instructions were two-fold: to confirm that the transcript reflected the portion of the tape at issue, and to indicate any errors and omissions in the translation into English or Spanish audible on the tape.

My review of the tape and transcript revealed several errors and omissions. I have transcribed some of the hearing tape and indicate where the errors were made. I reviewed only a small portion of the tape; I do not know whether there were additional errors or omissions in other parts of the transcript.

In the following, the original, correct transcript is in regular typeface. The corrected English translation is in

bold. The incorrect transcript is in brackets. Questions or answers incorrectly interpreted are set out in *italics*.

/s/ Ron Earnest
RON EARNEST
Certified Court Interpreter
September 22, 1998

Beginning on page 92 of the Administrative Record (AR), at line 1:

* * *

Direct examination by Mr. Aguirre's then-attorney, Mr. Long:

Q. Are you willing to return to Guatemala?

A. No.

Q. Do you think the government would be able to control those who are threatening you?

The question was incorrectly interpreted to Mr. Aguirre in Spanish as: "Do you think the government that now controls Guatemala could be a threat to you?"

. . . .

Cross examination by the INS Trial Attorney, Mr. Knuck, at AR 93:

A. And were there any people aboard these buses when you did this?

Q. **No, because when we stopped the bus, we would get all the people off, since there were so many, we would throw rocks at it, and then we would get them out.**

[Mr. Aguirre's answer was incorrectly translated into English as: "No because we would stop the bus, help all

the people, uh, get out of the bus, and then because there were so many, we would just stone them and make them get away and then burn the bus."]

Q. To your knowledge, was anyone hurt during any of these bus burnings or stonings?

A. Of the students or the other people?

Q. The other people?

A. No, we would just hit them if they did not want to get off.

Q. How did you hit them? Did you strike them with a club? Or how?

The question was incompletely translated to Mr. Aguirre in Spanish as: "How did you hit them? With a. . . . "

A. **With sticks. Or we would tie them with a lasso like this, we would get them off. But if they obeyed and got off then we would not.**

[Mr. Aguirre's answer was incorrectly translated into English and incorrectly transcribed by the transcriber as: "We would have sticks, you know, to hit them with or we would just tie them with ropes. But if they be, I mean if they hit our, uh, the bus then we get off the bus." The transcriber mistranscribed the word "heed" as "hit" and changed the entire meaning of the end of this testimony.]

Continued cross examination at AR 94:

Q. When you were burning these buses and throwing rocks and things at people did you cover your face with a bandanna or in some other way hide your identity?

The question was incompletely interpreted to Mr. Aguirre as: "During the burnings of these buses or the fires that you made

did you disguise yourselves or did you cover your faces or use some kind of disguise so that you would not be known?" The phrase, "throwing rocks and things at people" was not interpreted to Mr. Aguirre.

A. Yes, we would cover our faces.

Q. And during the times that you burned the buses, you say you also broke windows and other things?

A. **Yes, we broke store windows and took out everything they had.**

[Mr. Aguirre's answer was incorrectly translated into English as: "Yeah, we would break the windows of the stores and we would just take, I mean, um, uh, raid the stores. Taking everything they have."]

Q. So you were, in other words, looting the stores?

A. **We did not steal, we took the people out of the store. Took out what they had set up, threw it on the floor.**

[Mr. Aguirre's answer was incorrectly translated into English as: "No, we did not steal from the stores, we simply took the people out of the stores that were there. And we would throw everything on the floor."]

Q. The people who were in the stores, did you treat them in a similar fashion that you treated the people on the bus, that is throw rocks at them and hit them with sticks and tie them with ropes in order to get them to go?

The question was incorrectly interpreted to Mr. Aguirre as: "The people who were in the stores, did you treat them in a similar fashion that you treated the people on the bus, that is hitting them with some stick and tying them up with a rope, a

lasso?" That is, the words, "throw rocks at them" were not translated.]

A. **If they did not try to do anything to us, we would not do anything to them. Because we would explain, for example to the people in the bus, why we were protesting and sometimes they would support us, because we told them it was because of the high fares.**

[Mr. Aguirre's answer was incorrectly translated into English as: "If they did not try to do anything to us, we would not do anything to them. Because, we would always explain to the people who were there in the buses, for instance, why we were doing these things, because of the high, um, fares that the buses had. Some of them would even, uh, support us.]

Continuing cross examination on AR 95:

Q. I assume that burning the buses and breaking the windows and such things is a crime in Guatemala?

A. **Well, it is not seen as a serious crime but if we were caught we would have to pay, like with jail.**

[Mr. Aguirre's answer was incorrectly translated into English as: "Uh, it doesn't seem to be a crime, but if we are caught we would have to be jailed then."]

Q. So, I would further assume that if the government did know your identify as one of these people in the groups that were burning the buses, that they would come and arrest you and put you in jail?

A. **Well, it would depend on whether the group would allow itself to be arrested. Because one fights with the police; they almost never catch you. But if they caught you, yes.**

[Mr. Aguirre's answer was incorrectly translated into English as: "Only if they catch us, because usually whenever the police come, we always fight the police. And so if when they, uh, catch one of us."]

Q. I guess that's my point, sir, that you were never arrested and jailed, the government didn't know that you were doing these activities? Is that correct?

The question was incorrectly interpreted to Mr. Aguirre as: "Perhaps that is my question, since the government never knew your identify and that you were participating in these activities? Is that correct?

Continuing cross examination on AR 96:

Q. Now, Mr. Aguirre, you mentioned that some people that you identified as guerrillas came to you and asked you to stop your activities. And I assume that those activities were burning buses and breaking windows?

A. **What they wanted was that other groups not compete with them, and get to take over the government.**

[Mr. Aguirre's answer was incorrectly translated as: "What they did not want is another group to make competition for them and have other groups do the things to the government."]

. . . .

Examination by the Immigration Judge, at AR 97:

Q. In your application, you indicate that after leaving Guatemala you became aware of what happened regarding your information that student leaders were going to be killed. Do you understand what I'm talking about?

The interpreter interpreters [sic] this question as: "In your application you indicate that after you came to the United States or after you left Guatemala? (Interpreter then asks for clarification from the Judge: 'That he stopped his activities, what did you say?') In your application that after you left Guatemala you became aware of what happened. Regarding your information that student leaders were going to be killed. Do you understand what I am talking about?"

A. **No. I need for you to explain that better. Because the question confuses me.**

[Mr. Aguirre's answer was translated into English by the interpreter as: "I need to have a better explanation because the question somewhat confuses me." The interpreter's interpretation was mistranscribed by the transcriber as "I didn't have a better explanation."]

Q. After leaving Guatemala did you learn if any student leaders were harmed or killed?

A. **Yes, they killed a student, but not somebody I knew, I just read in the newspaper I bought in California that they had killed a member of the union, then later my friends came here. The other four.**

[Mr. Aguirre's answer was incorrectly translated into English as: "Uh, yes, I learned in California through the news, in the newspaper that I read, that one of our members of the, uh, syndicate, uh, the student syndicate that had been killed, but other members, about four other members, came this way too. They left Guatemala and came this way."]

Re-direct by Mr. Long, at AR 99:

Q. Did they investigate murders in Guatemala?

A. **Not always. When it is a private citizen they almost never investigate.**

[Mr. Aguirre's answer was incorrectly translated into English as: "When it a particular, I mean a private citizen, they very seldom investigate."]

Q. Why would they be after people who break windows if they are not after murderers?

A. **In other words, it is based on what they see at the moment, and they do take those they can capture. And it is easier for them.**

[Mr. Aguirre's answer was incorrectly translated into English as: "They base themselves on what they see at the time and those where they captured and take them. And this is much easier for them."]

Q. You mean they wouldn't come after you if they found out about it later?

A. **After the act? Only if it is extreme. If it is the first time, no, but if I continue and they continue to discover it's me, they would get a court order and like that.**

[Mr. Aguirre's answer was incorrectly translated into English as: "Uh, if it is the first time, uh, they will not, but if they find out that continually I am the person involved then they will get a judicial order and come and get me."]

* * *

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* * *

[p. 92] Q. Are you willing to return to Guatemala?

A. No.

Q. Do you think the government would be able to control those who are threatening you?

A. If the government that is there now?

Q. Yes.

A. I will not be able to tell you now, because now I am not well informed as to how the government is doing there now.

Q. You would not be willing to go?

A. No.

MR. LONG TO JUDGE

Q. I have no further questions.

JUDGE TO MR. KNUCK

Q. Mr. Knuck?

A. Thank you, Your Honor.

MR. KNUCK TO MR. AGUIRRE

Q. Mr. Aguirre, you say that you personally burned some buses and broke some windows and things in some of these organized uprising in that you were involved?

A. Yes.

Q. On how many occasions did you burn a bus?

A. Uh, during the time of '89 and '92, all those years, we burned buses.

Q. Okay. And, how many buses do you thing you burned during those three years?

[p. 93] A. Myself or all the association?

Q. Yourself.

A. In our group, about 10, at the time.

Q. And, how would you burn them? Would you splash gasoline on them? Or, exactly how?

A. Yes. We was, uh, just, uh, uh, splashing with gasoline and then burned them and then burn the tires and all.

Q. And, were there any people on board these buses when you did this?

A. No, because we would stop the bus, help all the people, uh, get out of the bus, and then because there were so many, we would just stone them and make them get away and then burn the bus.

Q. To your knowledge, was anyone hurt during any of these bus burnings or stonings?

A. Of the students or the other people?

Q. The other peopl ?

A. No, we just hit them if they did not want to get off the bus.

Q. How did you hit them? Did you strike them with a club? Or, how?

A. We would have sticks, you know, to hit them with or we would just tie them with ropes. But, if they be, I mean if they hit our, uh, bus then we get off the bus.

Q. And, these people who were on the bus were just [p. 94] ordinary citizens of Guatemala?

A. Yes.

Q. And, you say one of the reasons you burned buses was to protest the high prices of the bus fares?

A. Yes.

Q. When you were burning these buses and throwing rocks and things at people did you cover your face with a bandanna or in some other way hide your identity?

A. Yes, we would cover our faces.

Q. And, during the times that you burned the buses, you say you also broke windows and other things?

A. Yeah, we would break the windows of the stores and we would just take, I mean, um, uh, raid the stores. Taking everything they have.

Q. So, you were, in other words, looting the stores?

A. No, we did not steal from the stores, we simply took the people out of the stores that were there. And we would throw everything on the floor.

Q. But you never stole anything?

A. No.

Q. The people who were in the stores, did you treat them in a similar fashion that you treated the people on the bus, that is throw rocks at them and hit them with sticks and tie them with ropes in order to get them to go?

A. If they did not try to do anything to us, we would [p. 95] not do anything to them. Because, we would always explain to the people who were there in the buses, for instance, why we were doing this and why we were protesting and doing these things, because of the high, um, fares that the buses had. Some of them would even, uh, support us.

Q. I assume that burning the buses and breaking the windows and such things is a crime in Guatemala?

A. Uh, it doesn't seem to be a crime, but if we are caught, we would have to be jailed then.

Q. So, I would further assume that if the government did know your identity as one of these people in the groups that were burning the buses, that they would come and arrest you and put you in jail?

A. Only if they catch us, because usually whenever the police come, we always fight the police. And so if when they, uh, catch one of us.

Q. Are you saying that if the police knew of your identity as one of the people who had, let's say, burned a bus two months ago, they wouldn't come and arrest you?

A. Yes, but, uh, they could not identify us because we were always well covered, well, ah, protected.

Q. I guess that's my point, sir, that you were never arrested and jailed, the government didn't know that you were doing these activities? Is that correct?

A. They have a list of all the students that are in [p. 96] the ministry of education because they get a list of all those who are students and they know who is doing

what. But, within this, uh, long list and large group of students, the police never really knows who is the leader and who is the one who is actively participating in this.

Q. Now, Mr. Aguirre, you mentioned that some people that you identified as guerrillas came to you and asked you to stop your activities. And I assume that those activities were burning buses and breaking windows?

A. What they did not want is another group to make competition for them and have other groups do the things to the government.

Q. So, you were burning the buses that they wanted to burn? Is that right?

A. Yes.

MR. KNUCK TO JUDGE

Q. I have nothing further, Your Honor.

JUDGE TO MR. LONG

Q. Re-direct, Mr. Long?

A. Yes, Your Honor, just a few questions.

Q. Before you do that, let me ask him just one thing, if I might?

A. Sure.

Q. Okay.

JUDGE TO MR. AGUIRRE

* * *

Relevant Paragraphs From the United Nations High Commissioner for Refugees Handbook on Procedures and Criteria for determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees

* * *

151. The aim of this exclusion clause is to protect the community of a receiving country from the danger of admitting a refugee who has committed a serious common crime. It also seeks to render due justice to a refugee who has committed a common crime (or crimes) of a less serious nature or has committed a political offence.

152. In determining whether an offence is "non-political" or is, on the contrary, a "political" crime, regard should be given in the first place to its nature and purpose i.e. whether it has been committed out of genuine political motives and not merely for personal reasons or gain. There should also be a close and direct causal link between the crime committed and its alleged political purpose and object. The political element of the offence should also outweigh its common-law character. This would not be the case if the acts committed are grossly out of proportion to the alleged objective. The political nature of the offence is also more difficult to accept if it involves acts of an atrocious nature.

* * *

155. What constitutes a "serious" non-political crime for the purposes of this exclusion clause is difficult to define, especially since the term "crime" has different connotations in different legal systems. In some countries the

word "crime" denotes only offences of a serious character. In other countries it may comprise anything from petty larceny to murder. In the present context, however, a "serious" crime must be a capital crime or a very grave punishable act. Minor offences punishable by moderate sentences are not grounds for exclusion under Article 1 F *(b)* even if technically referred to as "crimes" in the penal law of the country concerned.

156. In applying this exclusion clause, it is also necessary to strike a balance between the nature of the offence presumed to have been committed by the applicant and the degree of persecution feared. If a person has well-founded fear of very severe persecution, e.g. persecution endangering his life or freedom, a crime must be very grave in order to exclude him. If the persecution feared is less serious, it will be necessary to have regard to the nature of the crime or crimes presumed to have been committed in order to establish whether the applicant is not in reality a fugitive from justice or whether his criminal character does not outweigh his character as a *bona fide* refugee.

157. In evaluating the nature of the crime presumed to have been committed, all the relevant factors – including any mitigating circumstances – must be taken into account. It is also necessary to have regard to any aggravating circumstances as, for example, the fact that the applicant may already have a criminal record. The fact that an applicant convicted of a serious non-political crime has already served his sentence or has been granted a pardon or has benefited from an amnesty is also relevant. In the latter case, there is a presumption that the exclusion clause is no longer applicable, unless it

can be shown that, despite the pardon or amnesty, the applicant's criminal character still predominates.

* * *

169. A deserter or draft-evader may also be considered a refugee if it can be shown that he would suffer disproportionately severe punishment for the military offence on account of his race, religion, nationality, membership of a particular social group or political opinion. The same would apply if it can be shown that he has well-founded fear of persecution on these grounds above and beyond the punishment for desertion.

* * *

(10)

Supreme Court, U.S.
FILED
FEB 17 1999
CLERK

No. 97-1754

In the Supreme Court of the United States

OCTOBER TERM, 1998

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

JUAN ANIBAL AGUIRRE-AGUIRRE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

SETH P. WAXMAN
Solicitor General
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Department of Justice
Washington, D.C. 20530-0001
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37 pp

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In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 97-1754

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

JUAN ANIBAL AGUIRRE-AGUIRRE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

A. The Attorney General's Interpretation Of The Serious Nonpolitical Crime Exception Merits Substantial Deference

1. Respondent and his amici do not dispute that the statutory phrase at issue in this case—"serious nonpolitical crime"—is ambiguous. Indeed, the court of appeals' ruling and respondent's argument labor to pour their own meaning into the phrase. The question, then, is quite simple: to whom has Congress assigned the responsibility for construing an ambiguous statutory provision governing immigration and international affairs that is couched in terms of what the "Attorney General determines"—the Attorney General or the courts? As we explain in our opening brief (Br. 19-22), the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, itself clearly answers that question by requiring deference to the Attorney General. 8 U.S.C. 1103(a) (the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling"). This Court's decisions provide the same answer. See Gov't Br. 19-22, 39.

The fact that this case arises against the backdrop of the United Nations Protocol Relating to the Status of Refugees (Protocol), Jan. 31, 1967, 19 U.S.T. 6224, and the incorporated provisions of the United Nations Convention Relating to the Status of Refugees (Convention), July 28, 1951, 189 U.N.T.S. 150, *reprinted in* 19 U.S.T. 6259, does not diminish the deference owed the Attorney General. "[T]he meaning attributed to treaty provisions by the Government agencies charged with their * * * enforcement is entitled to great weight." *United States* v. *Stuart*, 489 U.S. 353, 369 (1989); see also *El Al Israel Airlines, Ltd.* v. *Tsui Yuan Tseng*, 119 S. Ct. 662, 671 (1999).

2. Respondent's argument (Br. 23-25) that no deference is due because the Attorney General has been inconsistent in her interpretation of the serious nonpolitical crime exception is devoid of merit. In *In re Rodriguez-Coto*, 19 I. & N. Dec. 208 (BIA 1985), the Board of Immigration Appeals (Board) specifically "reject[ed] any interpretation of the phrases 'particularly serious crime' and 'serious nonpolitical crime' * * * which would vary with the nature of evidence of persecution." *Id.* at 209. That ruling was not "dictum" (Resp. Br. 20), even if we assume, arguendo, that such a characterization has relevance in the administrative context. The Board found it "necessary" to reach the question. 19 I. & N. Dec. at 209 n.2. And the Eleventh Circuit had no trouble recognizing the ruling as a definitive and "sufficiently authoritative" (Resp. Br. 21) expression of the Attorney General's position. See *Garcia-Mir* v. *Smith*, 766 F.2d 1478, 1487 n.10 (1985), cert. denied, 475 U.S. 1022 (1986). The two cases respondent cites (Br. 18-19) as reflecting a contrary position in fact did not resolve the question, and they were decided five years before *Rodriguez-Coto*.[1]

[1] See *In re Ballester-Garcia*, 17 I. & N. Dec. 592, 596 (BIA 1980) (outcome the same whether balancing test or "traditional view" is applied); *In re Rodriguez-Palma*, 17 I. & N. Dec. 465, 469 (BIA 1980) (outcome the same "whether we apply a balancing test or make our determination based solely on the nature of the offense involved"). Respondent's citation (Br. 21) of *In re Rodriguez-Majano*, 19 I. & N. Dec. 811 (BIA 1988), and *In re Izatula*, 20 I. & N. Dec. 149 (BIA 1990), is even further afield. Neither case concerned the statutory provision at issue here, addressed the question of whether the risk of persecution should be rebalanced, or involved violence directed solely against innocent civilians.

Equally inapposite is the reliance by respondent (Br. 23-24) and amicus United Nations High Commissioner for Refugees (UNHCR) (Br. 22-23) on the prior practice of the Immigration and Naturalization Service (INS) and the Board of treating an alien's commission of a serious nonpolitical crime as a factor to be taken into account in deciding whether to grant asylum under 8 U.S.C. 1158(a) (1994) as a matter of discretion. See, *e.g.*, 53 Fed. Reg. 11,301-11,302 (1988) (eliminating earlier regulatory provision, 8 C.F.R. 208.8(f)(v) (1981), that mandated denial of asylum on that ground). The post-1988 asylum practice reflected the fact that, before the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, the INA contained no prohibition against granting asylum to an alien who the Attorney General had serious reasons for believing had committed a serious nonpolitical crime before coming to the United States. As a result, the Attorney General was free to weigh the alien's risk of persecution in the manner recommended by the UNHCR in deciding whether to grant asylum, even though she could not do so with respect to the statutory bar to withholding of deportation. See 53 Fed. Reg. at 11,302 (explaining distinction).[2]

3. Finally, respondent's claim that the content of the Board's decision disentitles it to deference is baseless. It is true (Resp. Br. 22) that the Board in this case did not

[2] Section 604 of IIRIRA, 110 Stat. 3009-690, created a parallel statutory bar to eligibility for asylum as well, which applies to applications filed on or after April 1, 1997. See Gov't Br. 5 n.2.

reiterate its previous refusal to rebalance the persecution risk; but it was unnecessary to do so because *Rodriguez-Coto*, *supra*, had already answered that question. In any event, respondent is ill-positioned to offer up both that complaint and his criticism of the Board (Br. 22, 25-28) for failing to set forth its reasoning at greater length, because respondent never filed a brief with the Board or in any other way presented his current factual or legal theories for relief to the Board, although he was represented by counsel and his request for an extension of time to file a brief was granted. AR 13-21. The deference due the Board does not turn upon the Board's ability to divine and address arguments that were never presented to it, but that might be made for the first time in the court of appeals or this Court.

Respondent's further argument (Br. 24-25) that the Board's disagreement with the immigration judge (IJ) diminishes the deference owed is wrong. There is only one final determination by the Attorney General under review in this case, which is the Board's ruling.[3] It is true that the Board generally accords deference to the IJ's credibility findings; but the IJ's credibility findings had no bearing on the Board's ruling here because the Board simply applied the law to respondent's own admitted and uncontested statements. See Gov't Br. 42.[4]

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[3] See *Charlesworth* v. *INS*, 966 F.2d 1323, 1325 (9th Cir. 1992); *Martinez-Benitez* v. *INS*, 956 F.2d 1053, 1055 (11th Cir. 1992); cf. *INS* v. *Doherty*, 502 U.S. 314, 327 (1992) (Attorney General's disagreement with Board does not limit his discretion).

[4] Amicus Lawyers Committee for Human Rights (LCHR) mistakenly asserts (Br. 2-3, 8) that the government concedes that respondent has a well-founded fear of persecution. In fact, the Board expressly reserved that issue. See Pet. App. 18a.

B. The Board Reasonably Concluded That The Risk Of Persecution Upon Return Is Not Relevant In Determining Whether An Alien Committed A "Serious Nonpolitical Crime"

1. The court of appeals erred in requiring (Pet. App. 6a-7a) the Board, in deciding whether to withhold deportation, to balance the seriousness of the alien's crime against the risk of persecution he would face upon return. That consideration finds no support in the text or structure of Section 1253(h)(2)(C). See Gov't Br. 22-26. A future risk of persecution has no logical bearing on whether a previously committed crime was either serious or nonpolitical. It is simply an asserted justification for overlooking the offense. Further, Section 1253(h)(1) already weighs the risk of persecution an alien faces in determining his eligibility for withholding of deportation in the first place. Nothing indicates that Congress intended to count the persecution factor twice.[5]

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[5] Respondent notes (Br. 40) that the Board in this case applied the withholding exception without first determining whether respondent faced the requisite risk of persecution. See Pet. App. 18a. That is beside the point. The issue is one of statutory construction, not Board procedure. There is no gainsaying that, to adopt respondent's reading of Section 1253(h)(2)(C), the Court would have to conclude that Congress intended the risk of persecution to be weighed both in determining eligibility for withholding under Section 1253(h)(1), and again in evaluating the applicability of the exceptions under Section 1253(h)(2). Likewise, respondent's observation (Resp. Br. 39-40) that the Board "balances" by inquiring into whether the political aspect of an offense outweighs its common-law character proves nothing. That inquiry is necessary to give meaning to the ambiguous statutory term "serious nonpolitical crime." It does not, as respondent and amici advocate here, simply interject additional, extra-statutory considerations that (as respondent concedes, Br. 38) have no bearing on the meaning of Congress's chosen factors. The other instances of "balancing" cited by respondent (Br. 40 n.31) and LCHR (Br. 20) involved the weighing of factors in deciding whether to grant discretionary relief, and thus are even further afield from the application of the mandatory exception at issue here.

Respondent now agrees. He makes no effort to justify the risk-of-persecution factor as an interpretation of Section 1253(h)(2)(C). To the contrary, he concedes (Br. 38) that "[i]t is not that the seriousness of the crime varies with the likelihood or the degree of persecution. Nor does a past act become more or less political when future risk is considered." Instead, respondent and his amici argue (Resp. Br. 29-39; UNHCR Br. 16-24; LCHR Br. 3-22) that the risk of persecution must be balanced as an extra-statutory factor in order to conform United States law to the Protocol and its incorporated Convention provisions. But again, respondent and his amici do not contend that the risk-of-persecution factor has any "anchor[] in the text" (*Shannon* v. *United States*, 512 U.S. 573, 583 (1994)) of the Protocol or Convention.[6] Nor could they, because the Convention flatly denies refugee status to "any person with respect to whom there are serious reasons for considering that * * * he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee." Protocol art. 1(2), 19 U.S.T. at 6225; Convention art. 1(F)(b), 19 U.S.T. at 6261.[7]

Nor does the negotiating history of the Convention document a consensus that the Convention bound signatories to apply such a balancing test. Respondent and his amici rely (Resp. Br. 36 & n.26; UNHCR Br. 19; LCHR Br. 18 & n.15) on the statement of Conference President Larsen that, "[w]hen a person with a criminal record sought asylum as a refugee, it was for the country of refuge to strike a balance between the offences committed by that person and the

[6] See also *Itel Containers Int'l Corp.* v. *Huddleston*, 507 U.S. 60, 65 (1993) (interpretation of treaty language "must begin, as always, with the text of the Convention[]"); see also *El Al Israel Airlines*, 119 S. Ct. at 671.

[7] As respondent conceded below (C.A. Br. 17-18), the Protocol is not a self-executing treaty. It thus does not confer any rights beyond those granted by the implementing domestic legislation. See Gov't Br. 27.

extent to which his fear of persecution was well founded." *Summary Record of the Twenty-ninth Meeting*, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, at 23, U.N. Doc. A/Conf.2/SR.29 (July 19, 1951). That comment offers scant support for respondent's position. First, it was made in the course of describing the practice of some nations under previous international instruments, which is why it was worded in the past tense. See *ibid.* The statement thus did not purport to be an interpretation of any mandate to be included in the text of the Convention itself. Indeed, the president's next sentence "simply ask[ed]" representatives to "keep in mind" the hypothetical case of a minor official of an outlawed political party who had a criminal record, noting his belief that countries had always dealt with such cases "fairly" under earlier agreements. *Ibid.*

Second, the comment quoted above does not specifically mandate ad hoc, individualized balancing; it suggests only that the "country of refuge" strike a balance. See also *Summary Record of the Twenty-fourth Meeting*, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, at 13, U.N. Doc. A/Conf.2/SR.24 (July 17, 1951) (statement of Mr. Larsen as delegate of Denmark) ("A proper balance must be struck between all the considerations involved.") (cited in LCHR Br. 18-19 n.15). As explained in our opening brief (at 29-30), Congress, after weighing the relevant considerations, struck what it deemed to be the appropriate balance in the text of Section 1253(h), which adopts a categorical approach with respect to all aliens who are believed to have committed "serious nonpolitical crime[s]." In so doing, Congress, in effect, chose to give uniorm weight to persecution risk in the implementation of Section 1253(h), rather than a weight that varies and must be measured against the seriousness of particular past criminal conduct. In any event, the two remarks by a single delegate, upon which respondent and his amici rely, hardly constitute a "shared expectation[] of the contracting parties"

that could bind signatory nations. *Zicherman* v. *Korean Air Lines Co.*, 516 U.S. 217, 223 (1996); see also G. S. Goodwin-Gill, *The Refugee in International Law* 102 n.126 (2d ed. 1996) ("The summary records [of the Convention] reveal shared concerns, but little consensus" on the serious nonpolitical crime provision.). That is especially so since respondent and his amici cite nothing—and there is nothing—in the text of the Convention itself that could reasonably be thought to impose such a requirement.

2. Respondent and his amici resort to the "overall object" and "purposes" of the Convention (Resp. Br. 29; LCHR Br. 19; UNHCR Br. 7-10). But again, they do so not to assist in the interpretation of ambiguous Convention terms, but rather to read into the Convention (and, derivatively, United States law) a mandatory, non-textual limitation on the expressly reserved sovereign power to exclude persons who are believed to have committed serious nonpolitical crimes. Even if we assume, for the moment, that such an approach is a valid means of treaty interpretation (cf. *Eastern Airlines, Inc.* v. *Floyd*, 499 U.S. 530, 535 (1991) (aids to treaty construction other than plain language "may be brought to bear *on difficult or ambiguous passages*") (emphasis added; citation omitted)), the argument is without merit.

Respondent claims (Br. 32) that the Convention's serious nonpolitical crime exception has two purposes: to protect the internal security of the country in which refuge is sought and to decline protection for persons who are fugitives from justice. The exception's purposes are not so limited, as we explain below. See pp. 9-12, *infra*. But even if they were, respondent fails to explain how rebalancing the risk of persecution advances either of those purposes. The persecution risk an alien would face upon return has no logical bearing on the threat to public order or safety that person might pose to the country of refuge. Nor does it contribute measurably to an effort to distinguish between fugitives from justice and refugees. The essential attributes of refugees are identified both under the Convention and United States law by the initial requirement that the alien demonstrate a well-founded fear of persecution (see Convention art. 1(A)(2), 19 U.S.T. at 6261; 8 U.S.C. 1253(h)(1)).[8]

Further, respondent's identification of the serious nonpolitical crime exception's purposes is incomplete. Internal security and public order were not the animating purposes of that exception. Both the Convention and United States law specifically address those concerns elsewhere. See Convention art. 33(2), 19 U.S.T. at 6276 (*non-refoulement* "may not * * * be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who * * * constitutes a danger to the community of that country"); 8 U.S.C. 1253(h)(2)(B) (exception for alien who "constitutes a danger to the community of the United States").[9]

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[8] Amicus LCHR invokes what it characterizes as the Convention's overall purpose of protecting "persons facing persecution in their countries." Br. 8, 19. But the Convention does not protect all "persons" facing persecution; it protects only those who meet its definition of "refugee," which in turn excludes persons who have committed serious nonpolitical crimes. Thus, LCHR's argument simply begs the question presented in this case. Furthermore, in appropriate cases, amici LCHR's and UNHCR's concern (LCHR Br. 20-21; UNHCR Br. 18) that aliens not be returned to face severe persecution, such as certain death or torture, could be addressed through a grant of asylum (for cases such as this one that arose prior to IIRIRA) or an exercise of the Attorney General's prosecutorial discretion to defer action or stay removal. In addition, the United States is a party to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 23 I.L.M. 1027, modified Mar. 1985, 24 I.L.M. 535 (see 136 Cong. Rec. S17,486-S17,492 (daily ed. Oct. 27, 1990); Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 2242, 112 Stat. 2681-822), and thus will not return any peson covered by that agreement to a country where he would likely be tortured.

[9] Amicus UNHCR's claim (Br. 18 & n.20, 19) that "delegate after delegate" expressed the view that an "intractable refugee" should not be returned to "certain death" overlooks that those comments were made

The language and negotiating history of the Convention also demonstrate that the serious nonpolitical crime exception reaches beyond pure fugitives from justice. First, the language does not require a finding that the individual in fact committed a crime; it requires only that there be "serious reasons for considering" that a crime was committed.[10] Second, draft proposals suggesting that the exception to *refoulement* exclude "case[s] of prosecutions genuinely arising from non-political crimes" or "persons liable to extradition" for crimes were not adopted.[11] Third, limiting the exception

during the debates over Article 33's provision for expulsion of a "refugee" by the host country for crimes committed within that country. They did not address the serious nonpolitical crime exception to attaining refugee status in the first instance. See *Summary Record of the Fortieth Meeting*, Ad Hoc Comm. on Refugees and Stateless Persons, 2d Sess., at 33, U.N. Doc. E/AC.32/SR.40 (Aug. 22, 1950) (the predecessor to Article 33's prohibition on return or expulsion of refugees applied only to a "genuine refugee * * * coming under the well-pondered definitions contained in article 1"); *Summary Record of the Twentieth Meeting*, Ad Hoc Comm. on Statelessness and Related Problems, 1st Sess., at 15-21, U.N. Doc. E/AC.32/SR.20, (Feb. 1, 1950). Moreover, the statements upon which amicus UNHCR relies are by no means unequivocal. Thus, the Chairman stated (*id.* at 15) that it was for the government concerned "to find some means of making reservations to meet special cases" of "intractable refugees," while accepting the "general principle" of not expelling refugees to territories where they would meet certain death. And the representative of the United Kingdom stated only that the "power" to expel any alien "would of course not be employed if it would endanger his life" (U.N. Doc. E/AC.32/SR.40, *supra*, at 31); he did not say that the Convention would divest the signatories of the power itself.

[10] See Convention art. 1(F), 19 U.S.T. at 6261; see also 8 U.S.C. 1253(h)(2)(C); N. Robinson, *Convention Relating to the Status of Refugees: Its History, Contents, and Interpretation* 67 n.60 (1953) (serious nonpolitical crime exception "refer[s] to persons who, in the *opinion* of the competent authorities of the state concerned, committed the crime or act").

[11] U.N. Doc. A/Conf.2/SR.24, *supra*, at 10-16; *Summary Record of the Thirty-third Meeting*, Ad Hoc Comm. on Refugees and Stateless Persons, 2d Sess., at 8, U.N. Doc. E/AC.32/SR.33 (Aug. 14, 1950); see also Goodwin-Gill, *supra*, at 105.

to fugitives from justice would make the operation of the serious nonpolitical crime exception vary depending, not upon the conduct of the alien, but rather upon the prosecutorial resources and wherewithal of the country in which the crime occurred.

In addition, respondent ignores the fact that perhaps the most important purpose of the serious nonpolitical crime exception was to provide signatory nations a measure of flexibility and to equip them with a tool for sifting out those persons deemed undeserving of refugee status.[12] Recognizing both the sensitive nature of governmental decisions to afford safe haven to persons who have committed serious nonpolitical crimes in other countries and the wide variations in nations' criminal laws, moreover, the Convention drafters entrusted the delicate task of drawing lines and applying the Convention's terms to the individual States Parties.[13] Thus,

[12] See UNHCR Br. 7-10; U.N. Doc. E/AC.32/SR.33, *supra*, at 8 (exception "brought the Convention into accordance with the requirements of international morality and provided a safeguard for genuine refugees and for the receiving countries"); U.N. Doc. A/Conf.2/SR.24, *supra*, at 5 ("There were so many *bona fide* refugees that it was important not to allow any confusion between them and ordinary common-law criminals."); *id.* at 6 ("The real purpose of paragraph E [now F] of article 1 was to exclude from the scope of the Convention persons regarded as criminals, on the grounds that they should not be placed on an equal footing with *bona fide* refugees."); Goodwin-Gill, *supra*, at 95 & n.105 (Article 1(F)'s exclusions from refugee status describe persons "not deserving the benefit of refugee status," and each signatory State will determine the applicability of the serious nonpolitical crime exclusion "according to its own standards"); J. C. Hathaway, *The Law of Refugee Status* 214-215 (1991) (Article 1(F) exclusions allow signatory States to withhold protection from "undesirable refugees"); S. Aga Khan, *Legal Problems Relating to Refugees and Displaced Persons*, 149 Recueil Des Cours (Collected Courses of the Hague Academy of Int'l Law) 287, 298 (1977).

[13] See Gov't Br. 21-22, 29; P. Weis, *Legal Aspects of the Convention of 25 July 1951 Relating to the Status of Refugees*, 1953 Brit. Y.B. Int'l L. 478, 480 (1954) ("The determination whether an individual is a refugee in the sense of Article I of the Convention and whether, therefore, the Convention is to be applied to him is clearly within the competence of the

contrary to the assertion of the UNHCR (Br. 16- 17), the fact that the United States does not balance the risk of future persecution against the seriousness of the past crime does not prevent other countries from doing so if they wish.[14]

C. The Board Reasonably Concluded That Respondent's Offenses Constituted "Serious Nonpolitical Crimes" Even Though They Were Not "Atrocious" In Character

Neither respondent nor his amici make any effort to defend the court of appeals' ruling that the Attorney General must consider whether an alien's crimes involved "acts of an atrocious nature" (Pet. App. 6a). Nor could they. See Gov't

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Contracting States."); Goodwin-Gill, *supra*, at 105; Hathaway, *supra*, at 214-215 ("[I]t falls to each contracting state to decide for itself when a refugee claimant is within the scope of an exclusion clause."). For this reason, the United States has long considered the guidelines from the UNHCR Handbook to be "just that—guidelines," which "may be accepted or rejected with respect to a signatory state's interpretation of the Convention." *U.S. Refugee Program: Oversight Hearings Before the Subcomm. on Immigration, Refugees, and Int'l Law of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 26 n.5 (1981) (Office of Legal Counsel Memorandum).

[14] This flexibility is also manifest in the differing approaches of signatory nations to balancing the risk of persecution. The British House of Lords has specifically rejected the balancing test proposed here. *T* v. *Secretary of State for the Home Dep't*, 2 All England L. Rep. 865, 882 (House of Lords 1996) (Lord Mustill) ("[T]he crime either is or is not political when committed, and its character cannot depend on the consequences which the offender may afterwards suffer if he is returned."); but see UNHCR Br. 21 n. 23 (citing French case applying the balancing test); *Malouf* v. *Canada*, 1995 1 Can. Fed. Ct. Rep. 537, 556-557 (Can. Fed. Ct. 1994) (adopting balancing test). Amicus UNHCR also cites (Br. 20) the Council of the European Union's *Joint Position on the Harmonized Application of the Term "Refugee,"* E.U. Doc. No. 96/196/JHA ¶ 13 (1996). That document, however, expressly provides that it "shall not bind the legislative authorities or affect the judicial authorities of the Member State[s]." *Id.* (preamble). Moreover, while the document proposes a "harmonized" approach by member States that would be consistent with the UNHCR's guidance, it does not suggest that the Convention mandates that approach.

Br. 33-38. Instead, they now argue that the serious nonpolitical crime exception must be confined to "very grave" offenses. Resp. Br. 38; LCHR Br. 9. This argument, however, suffers from the same fatal defects as the requirement that the crimes be "atrocious." "Serious" and "very grave" are not synonyms; had Congress intended to limit the exception to "very grave" crimes, it would have said so. See 5 U.S.C. 1212(g)(2)(B) (referring to "exceptionally grave" damage). Further, as explained in our opening brief (at 34-35), Section 1253(h)(2)(B) separately precludes any alien who has been convicted of a "particularly serious crime" from obtaining mandatory withholding relief, and further defines "particularly serious crime" to include an "aggravated felony," 8 U.S.C. 1253(h)(2). The cramped reading of "serious crimes" that respondent and amicus LCHR advance entails an upside-down construction of Section 1253(h), under which "serious" crimes would register as more depraved and violent than "particularly serious crimes."[15] In any event, the evidence is quite clear that respondent's crimes of arson and assault with weapons satisfy both the INA's and the Convention's terms.[16]

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[15] The Convention similarly distinguishes between "serious" and "particularly serious" crimes (Convention art. 33(2), 19 U.S.T. at 6276), and thus "serious nonpolitical crime" must be afforded a construction that does not render superfluous the reference to "particularly serious crimes" elsewhere in the Convention's text. Clearly, a crime that excludes an alien under Article 1(F)(b) does not have to be tantamount to a war crime or a crime against humanity, which are addressed by Article 1(F)(a) and (c). See 1 A. Grahl-Madsen, *The Status of Refugees in International Law* 294-295 (1966) (rejecting such a construction as "too restrictive" and inconsistent with practice); Robinson, *supra*, at 69 n.67.

[16] See Gov't Br. 43 (citing authorities); Hathaway, *supra*, at 224 ("violence against persons" and arson); Goodwin-Gill, *supra*, at 107 (describing criteria proposed by UNHCR for screening Mariel Cuban asylum seekers in 1980) (arson, and assault accompanied by aggravating factors; use of weapons and injury to person suggest crime is "serious"); UNHCR Br. 14 n.16 (same). Respondent's argument (Br. 48) that his conduct did

Respondent, moreover, fails to come to grips with the Attorney General's position that the serious nonpolitical character of criminal conduct is influenced, not simply by its abstract gravity or Model Penal Code classification, but also by the identity of its victims. As explained in our opening brief (at 35-41), the Attorney General has determined that criminal violence targeted solely or primarily at innocent civilians will often be disproportionate to any reasonable political objective and thus will likely constitute a serious nonpolitical crime. See also *In re Atta*, 706 F. Supp. 1032, 1039 (E.D.N.Y. 1989) ("[T]he United States does not regard the indiscriminate use of violence against civilians as a political offense."). That principle is consonant with longstanding judicial definitions of political activity, see Gov't Br. 35-36 (citing cases), with well-established principles of international law, *id.* at 36-37 (citing international instruments), and with the position of the UNHCR (Br. 26-29).[17] Respondent, for his part, cites absolutely no authority for the proposition that either United States law or the Convention and Protocol should be or were intended to be construed to protect persons who deliberately and repeatedly target innocent civilians for physical violence and property destruction.

D. The Board Reasonably Concluded That Respondent's Offenses Were "Serious Nonpolitical Crimes" Based On Their Nature And Character, Not Their Perceived Necessity Or Success

Respondent's defense (Br. 44-45) of the court of appeals' requirement that the Board factor in the necessity and

not constitute arson is mistaken. See *United States* v. *Bedonie*, 913 F.2d 782, 789-790 (10th Cir. 1990) (federal arson statute, 18 U.S.C. 81, applies to the burning of a motor vehicle), cert. denied, 501 U.S. 1253 (1991); *State* v. *Hage*, 532 N.W.2d 406, 412 (S.D. 1995) (burning of school bus is arson).

[17] Other than balancing the risk of persecution, the Attorney General's practice under the INA is largely consonant with the approach recommended by the UNHCR, as the UNHCR recognizes (Br. 24).

success of criminal conduct is notable for its brevity. Respondent makes no argument that the text of the INA, Convention, or Protocol, or their respective histories, compels consideration of those factors. Respondent argues (Br. 45) only that violence may sometimes be necessary. But it is difficult to imagine the circumstances under which deliberate and repeated violence against innocent civilian victims would be necessary or justifiable. In any event, alleged necessity does not make criminal conduct any more or less "serious." Nor does it by itself make the violence political. Rather, the Board has determined that it is the nexus between the criminal conduct and the protestor's objectives vis-a-vis the governing authority that endows the crime with a political character. And, as amicus UNHCR acknowledges (Br. 26-29), it has long been recognized that crimes targeting civilians and promoting general social disorder lack a sufficiently close nexus to qualify as political.[18]

Respondent is correct (Br. 46-47) that the cases we cite generally deal with violence against civilians in the context of what might be characterized as terrorist offenses. But nothing in the text of the INA or the relevant international agreements requires the Attorney General to disregard civilian violence unless it reaches the extreme level of terrorism. Indeed, it is eminently reasonable and consistent with principles of international law to conclude that unprovoked,

[18] See Gov't Br. 40 (citing cases); UNHCR Br. 26 ("[T]he link [to political conduct] is weakest when politically motivated acts are principally directed against private interests and is non-existent when those acts are intended to do nothing more than promote social chaos.") (internal quotation marks omitted); see also *Ahmad* v. *Wigen*, 910 F.2d 1063, 1066 (2d Cir. 1990) ("We agree that an attack on a commercial bus carrying civilian passengers on a regular route is not a political offense. Political motivation does not convert every crime into a political offense.").

deliberate, repeated crimes against civilians will bear a heavy presumption that they are "nonpolitical."[19]

Requiring the Board to consider the success of criminal activity is even more counterintuitive. Under respondent's theory (Br. 44), repeated failures in accomplishing a political objective suggest that the underlying conduct was nonpolitical. But whether a protest action succeeds the first, fifth, or fiftieth time does not determine its essential political character. The lack of success may more readily be attributable to the level of oppression or the entrenchment of governmental officials.[20]

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[19] In any event, respondent (Br. 45) and amicus Massachusetts Law Reform Institute (MLRI) (Br. 6-25) exaggerate the "necessity" of violence against civilians to effect political change in Guatemala. Guatemala has enjoyed seven peaceful transfers of power between governments since 1985. AR 116; Dep't of State, *Country Reports on Human Rights Practices for 1997* 526-527, 533 (Joint Comm. Print 1998). Furthermore, shortly after respondent left Guatemala, an attempt by the then-President to suspend constitutional rule was quelled, and the President ousted, by purely peaceful protests. See Gov't Br. 40 n.17. MLRI's brief also cites instances of peaceful resistance by students and others. Br. 12 (referring to protest marches and strikes), *id.* at App. 9, 23, 55, 122. MLRI's other "evidence" of the need for respondent to resort to violence against civilians is lacking in completeness. For example, MLRI identifies (Br. 13) as "[t]he Price of Student Protest" a 1980 incident in which the Guatemalan government supposedly attacked student protestors solely *"for reading* a list of grievances at a foreign embassy." While not to excuse the Guatemalan government's response, what MLRI neglects to inform the Court is that, in addition to "reading a list of grievances," the students, who were armed with revolvers, Molotov cocktails, and machetes, seized the embassy and took a number of hostages, including the Spanish ambassador. D. Stoll, *Rigoberta Menchu and the Story of All Poor Guatemalans* 79-86 (1999). MLRI also fails to cite any authority for many of its assertions, such as claims that passengers joined in the destruction of buses (Br. 5 n.5, 16), and that the military killed the head of respondent's party, the UCN (*id.* at 9; cf. *Country Reports*, *supra*, at 529 (noting charges filed against and conviction of gang members involved in UCN leader's death)).

[20] We have already disposed of respondent's alternative claim (Resp. Br. 17 n.7) that he is entitled to relief under the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, Div. C, Tit. IV-B, § 413(f), 110 Stat. 1269, amendments to the INA. See Gov't Br. 31-32 n.13.

E. Substantial Evidence Supports The Board's Determination That Respondent's Violence Constituted "Serious Nonpolitical Crimes"

As our opening brief details (at 41-46), substantial evidence supports the Board's determination that respondent's admitted, repeated acts of assault, arson, and vandalism targeted solely at innocent civilians constitute serious nonpolitical crimes.[21] Perhaps recognizing this, respondent seeks to amend rather than defend the record below. But his efforts to do so are too little too late.

First, respondent's attempted re-translation of his testimony is wrong. Respondent argues (Br. 11-12) that he never admitted to throwing stones at passengers, and that he said only that he "thr[e]w rocks at the buses" (Br. 12). As we explain in our reply brief at the petition stage (at 2)—an explanation that respondent still has not answered—the tape recording reveals that respondent referred to the object of his stoning by using the feminine direct object pronoun "la" (translated as "the," A. Gooch et al., *Cassell's Spanish-English, English-Spanish Dictionary* 385 (1978)). That "la" refers back to his use of the feminine noun "la gente" ("the people," *id.* at 332), and not to the masculine noun "el bus" ("the bus," *id.* at 80 (autobus)). Had respondent intended to refer to "el bus," he would have used the masculine direct object pronoun "lo" (*id.* at 396).[22]

Second, respondent's claim cannot be raised for the first time in this Court. This is "a court of review, not one of first

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[21] Indeed, MLRI's lengthy discussion (Br. 16-20) of bus burnings in Guatemala provides powerful evidence that respondent's conduct was predominantly economically motivated violence targeted at the actions of private bus owners.

[22] We lodged a copy of the tape recording of the administrative hearing with the Court at the petition stage.

view." *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 457 (1995). Section 1105a(a)(4) of Title 8 directs, moreover, that an alien's petition for judicial review of a final order of deportation "shall be determined solely upon the administrative record upon which the deportation order is based." See also *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973) (per curiam).[23]

Respondent, who was represented by the same attorney before the court of appeals, offers no sound excuse for his tardiness. Respondent's insistence (Br. 13-15) that the tape could not have been acquired earlier is pure surmise: he never asked. As soon as he did, the tape was promptly provided (*id.* at 15).[24] Nor was access to the tape necessary. In the brief it filed with the Board, the INS specifically relied upon the transcription of respondent's testimony stating that he stoned persons. AR 25. With or without a tape of the hearing, respondent himself surely knew whether that was an accurate account of his activities and his testimony, and at that time could have called any discrepancy to the Board's attention. But respondent declined to file either a brief before the Board or a motion to remand to the IJ. 8 C.F.R. 3.2(b) and (c)(4) (1998); *In re Coelho*, 20 I. & N. Dec. 464, 471 (BIA 1992). Furthermore, after the Board rendered its decision, which relied in significant part on the transcript showing that respondent had stoned and hit bus passengers

[23] Although Congress repealed Section 1105a in 1996, Congress reenacted that same provision as part of IIRIRA. See 8 U.S.C. 1252(b)(4)(A) (Supp. III 1997). Because respondent's deportation order was final before IIRIRA's enactment, 8 U.S.C. 1105a(a)(4) governs his case. See 8 U.S.C. 1252 note (Supp. III 1997).

[24] We are informed by the Executive Office for Immigration Review that, during proceedings before the IJ, the tapes are available for review from the clerk of the immigration court. Once an appeal to the Board is filed, the tape is sent to the Board for transcription and is available under the Freedom of Information Act, 5 U.S.C. 552. It may also be possible to obtain the tape through more informal methods, as occurred in this case.

(see Pet. App. 13a), respondent could have filed a motion to reopen or reconsider before the Board. 8 C.F.R. 3.2 (1996).[25] But he failed to do so. And before the court of appeals, respondent relied upon his testimony, Resp. C.A. Br. 24, 26, rather than challenge it. Respondent's failure to bring to the court of appeals' attention a claim of which he reasonably was (or should have been) aware far earlier counsels strongly against this Court granting a remand on that same basis. See, *e.g.*, *Heller* v. *Doe*, 509 U.S. 312, 319 (1993); cf. 28 U.S.C. 2347(c) (providing for interlocutory remand by a court of appeals in which a petition for review is pending only if the party adduces additional "material" evidence and "there were reasonable grounds for failure to adduce the evidence before the agency") (rendered inapplicable to immigration petitions for review filed after October 31, 1996, see IIRIRA § 309(c)(4)(B), 110 Stat. 3009-626; 8 U.S.C. 1252(a)(1) (Supp. III 1997)) (discussed in Gov't Br. (at 46-47 & n.21) and Reply Br. (at 4) in *Reno* v. *American-Arab Anti-Discrimination Comm.*, No. 97-1252 (argued Nov. 4, 1997)).[26]

[25] Since July 1, 1996, a ninety-day time limit has been imposed on motions to reopen, unless the INS joins the motion. 8 C.F.R. 3.2(c)(2) and (c)(3)(iii) (1998); see also 61 Fed. Reg. 18,905 (1996); *id.* at 32,924.

[26] Respondent has also failed to exhaust his administrative remedies on this point. 8 U.S.C. 1105a(c) (1994) ("An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations."); 8 U.S.C. 1252(d)(1) (Supp. III 1997); *Ravindran* v. *INS*, 976 F.2d 754, 762-763 (1st Cir. 1992) (claim of inadequate translation barred by failure to exhaust); see also *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37 (1952). Respondent cites (Br. 15) as authority for a remand *Communist Party of the United States* v. *Subversive Activities Control Bd.*, 351 U.S. 115 (1956). But there the new evidence that served as the basis for the remand "was not in existence when the proceedings were concluded before the" administrative agency. *Id.* at 125. Both *Willing* v. *Binenstock*, 302 U.S. 272 (1937), and *Panama Mail S.S. Co.* v. *Vargas*, 281 U.S. 670 (1930) (see Resp. Br. 16), were cases in which the record was devoid of facts pertaining to the relevant legal issue. Nor are any of the exceptional circumstances that occurred in *Wood*

Third, the translation errors respondent identifies, even if accurate and properly preserved, are immaterial. Even if we assume, *arguendo*, that hurtling rocks at a bus with glass windows that is loaded with innocent passengers is not itself serious criminal conduct, under respondent's own interpretation he still admits to tying up innocent civilians and beating them with sticks to force them to abandon the buses and stores he intended to burn and vandalize. See Resp. Br. App. 11-13. The alleged translation errors thus hardly obviate the serious nonpolitical character of his crimes.[27]

* * * * *

For the foregoing reasons, and for those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

FEBRUARY 1999

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v. *Georgia*, 450 U.S. 261 (1981), present here. Lastly, the power to grant, vacate, and remand under 28 U.S.C. 2106 should not be used simply to excuse a party's default or lack of due diligence. Respondent's invocation of "due process" (Br. 12-13) does not aid his claim, because the Board and the IJ were available to provide him fair process. See *Vargas* v. *United States Dep't of Immigration & Naturalization*, 831 F.2d 906, 908 (9th Cir. 1987).

[27] Only a month before filing his answering brief in this Court, and nearly half a year after he first raised the translation issue in his brief in opposition, respondent filed a motion to remand with the Board. Resp. Br. App. 1-21. The INS has asked the Board to hold the motion in abeyance pending the Court's decision in this case. Also, for the Court's information, the Attorney General has exercised her discretion to stay temporarily the removal of most Guatemalan nationals (which would include respondent) in the wake of Hurricane Mitch's devastation. Unless extended, however, that stay will expire on March 8, 1999.

AMICUS CURIAE

BRIEF

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner,
v.
JUAN ANIBAL AGUIRRE-AGUIRRE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE LAWYERS COMMITTEE FOR HUMAN RIGHTS IN SUPPORT OF THE RESPONDENT

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BRIEF *AMICUS CURIAE* OF THE LAWYERS COMMITTEE FOR HUMAN RIGHTS IN SUPPORT OF THE RESPONDENT

INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae the Lawyers Committee for Human Rights offers this brief, with the consent of the parties, in support of the Respondent, Mr. Juan Anibal Aguirre-Aguirre.

Since 1978, the Lawyers Committee has worked to protect and promote fundamental human rights. Its work is impartial, holding all governments accountable to the

[1] No person or entity has made monetary contributions toward this brief, and no counsel for any party authored any portion of the brief. The Lawyers Committee for Human Rights files consents of counsel for the parties to file this brief together with this *amicus* brief.

standards affirmed in the International Bill of Human Rights. The Lawyers Committee has worked to ensure protection of the rights of refugees, including the right to seek and enjoy asylum. Its work is grounded in the international standards of the 1951 Convention relating to the Status of Refugees, the 1967 Protocol relating to the Status of Refugees, and other international human rights instruments. The Lawyers Committee advocates adherence to these standards in U.S. law and policy.

With the assistance of volunteer lawyers, the Lawyers Committee operates the largest and most successful *pro bono* representation program for refugees in the country and provides legal representation, without charge, to hundreds of indigent refugees each year. The Lawyers Committee and its volunteer attorneys currently represent 900 clients from more than 70 countries, and in the past year have taken on more than 150 cases. Specific to the matter at issue in this case, the Lawyers Committee is currently conducting a 2 year study of the application of the exclusion clauses of the 1951 Convention and 1967 Protocol, both in the United States and in other countries. The Lawyers Committee believes that the resolution of this case may affect a significant number of applicants for asylum and withholding of deportation.

SUMMARY OF ARGUMENT

The Lawyers Committee for Human Rights does not condone the Respondent's acts of forcibly removing persons from buses, burning buses, and destroying property while engaged in political protest. However the issue in this case is not whether the Respondent's acts of political protest were right or wrong. The issue is whether the acts committed by the Respondent constitute "serious nonpolitical crimes," and so justify returning the Respondent to face persecution in his country.

There is no dispute that the Respondent would face persecution if returned to Guatemala. It is accepted that

he has received death threats as a student leader, and that other persons in his situation have been killed. It is also accepted that he committed the acts in question in the course of protesting violations of fundamental human rights, including deaths and disappearances. The consequences of denying the protection of withholding of deportation in such circumstances are extremely serious. Only the most exceptional of circumstances will justify a decision to deny that protection.

The United States has long granted protection to individuals facing persecution. When the United States became a party to the United Nations Protocol relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223,[2] that commitment to protecting individuals from persecution became an obligation under international law. In 1980, the U.S. enacted the Refugee Act, Pub. L. No. 96-212, 94 Stat. 102, bringing that obligation into U.S. domestic law. There are few exceptions to the general obligation to provide protection to persons facing persecution. This case requires a consideration of one: the "serious nonpolitical crime" exception.

The "serious nonpolitical crime" exception in Section 243(h)(2)(C) of the Immigration & Nationality Act, 8 U.S.C. § 1253(h)(2)(C) (1994),[3] derives from Article 1F(b) of the Protocol, and should be interpreted consistently with the Protocol. This was the express intention of Congress. Ordinary rules of statutory construction

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[2] By ratifying the Protocol in 1968, the United States took on the obligations set out in the United Nations Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, *reprinted in* 19 U.S.T. 6259.

[3] Subsequent amendments introduced by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Tit. III-A, Div. C, § 305, 110 Stat. 3009-602, codified at 8 U.S.C. 1231(b)(3) (Supp. II 1996) do not apply to this case, as proceedings in this matter were initiated prior to April 1, 1997. IIRIRA, Tit. III-A, § 309(a) and (c), 110 Stat. 3009-625, 8 U.S.C. § 1101 note.

also requires that Section 243(h)(2)(C) be interpreted consistently with the Protocol. As the object and purpose of the Protocol is to protect persons from persecution, exceptions to the general obligation not to return a person to persecution must be construed narrowly. The Court of Appeals understood that the Section 243(h) provisions on withholding of deportation derived from the international obligations of the United States, and correctly relied on the Protocol to determine whether the Board of Immigration Appeals (BIA) erred as a matter of law in its interpretation of Section 243(h)(2)(C).

Reference to the Protocol, and to the sources that should be relied upon in interpreting it, confirms that the Court of Appeals correctly concluded that the BIA committed errors of law in finding that the Respondent's acts were "serious nonpolitical crimes" under Section 243(h)(2)(C).

First, an act must be very grave to qualify as a serious crime in the sense in which that term is used in section 243(h)(2)(C) and in Article 1F(b). Statements of the drafters, commentators, and the United Nations High Commissioner for Refugees (UNHCR) unanimously support this interpretation.

Second, where an act is committed for a political objective, it must be grossly disproportionate to that objective to be a serious *nonpolitical* crime. This test, set out in *McMullen v. INS*, 788 F.2d 591 (9th Cir. 1986), requires an analysis of the applicant's political objectives and the political context in which the acts were committed. The Court of Appeals correctly held that the BIA was in error in determining, without addressing these issues, that the Respondent's acts were nonpolitical as a matter of law.

Third, a balancing of the severity of the crime committed against the prospective persecution faced upon return must be conducted before denying the Respondent

the protection of withholding of deportation. Unanimous support for this balancing test is found in the overall object and purpose of the Protocol, in statements of the drafters of the Convention, and in opinions of expert commentators. The balancing process provides the flexibility needed to realize the purpose of the Protocol. Without this, persons presumed to have committed a crime which, although serious, was not heinous in nature, would be returned to their country, even if they were certain to face torture or death at the hands of a repressive regime.

ARGUMENT

I. THE "WITHHOLDING OF DEPORTATION" PROVISIONS OF SECTION 243(h) MUST BE INTERPRETED IN ACCORDANCE WITH THE PROTOCOL.

The "withholding of deportation" provisions of Section 243(h)[4] must be interpreted in accordance with the Protocol as a matter of plain language, congressional intent, and the general requirement that statutes be construed to be consistent with international law.

First, Congress adopted the express language of the Protocol in enacting Section 243(h). Section 243(h)(1) incorporates Article 33(1) of the Protocol, which imposes an obligation on States not to return a person to

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[4] Section 243(h) provides:

> (1) The Attorney General shall not deport any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.
>
> (2) Paragraph (1) shall not apply if the Attorney General determines that . . .
>
> (C) there are serious reasons for considering that an alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States.

persecution.[5] This requirement of "nonrefoulement" is a central obligation of the Protocol and the means by which the overall purpose of the Protocol—the protection of individuals facing persecution in their countries—is achieved. Section 243(h)(2)(C) mirrors Article 1F(b) of the Protocol which provides:

> "[t]he provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that . . .
>
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee."

Second, it was Congress's express intention, in enacting the "withholding of deportation" provisions of Section 243(h), to conform U.S. law to the United States' obligations under the Protocol. Congress also intended that the section be interpreted consistently with the Protocol. "If one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 [Refugees] Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the . . . Protocol. . . . [T]here were . . . many statements indicating Congress' intent that the new statutory definition of 'refugee' be interpreted in conformance with the Protocol's definition." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-7 (1987). *See also* Conf. Rep. No. 96-781, 20 (1979) ("The Conference adopts the House provision [setting out the four parts of Section 243(h)(2)] with the understanding that it is intended that [Section 243(h)(2)] be construed consistently with the Protocol.").

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[5] Article 33(1) provides:

> No contracting State shall expel or return ("refouler") a refugee in any manner whatsover to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

Third, Section 243(h) should be interpreted consistently with the Protocol to accord with the rule that a domestic statute must, whenever possible, be construed to be consistent with international law. *Murray v. Schooner Charming Betsy*, 6 U.S. 64 (1804) (the "Charming Betsy canon"). *See also Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 814-816 (1993) (Scalia, J. dissenting); *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982). This Court invoked this interpretive canon in construing the Protocol in *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 178 n.35 (1993). The BIA must also comply with this rule, as it applies to agency interpretations of the statutes for which they are responsible. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 499-501, 504 (1979).

What then is required for an interpretation of Section 243(h)(2)(C) to be consistent with the Protocol? First and foremost, an interpretation must accord with the object and purpose of the Protocol. "A treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." Art. 31(1), Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, 686.[6] An international treaty "should [be] construe[d] . . . to give effect to the purpose which animates it . . . . [W]here a provision of a treaty fairly admits of [two] constructions, one restricting, the other enlarging, rights which may be claimed under [the treaty], the . . . interpretation [which enlarges those rights] is to be preferred." *Bacardi Corp. of Am. v. Domenech*, 311 U.S. 150, 163 (1940) (citations omitted); *See also Eastern Airlines Inc. v. Floyd*, 499 U.S. 530 (1991).

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[6] Although the U.S. has not ratified the Vienna Convention, the State Department has stated that "the Convention is already generally recognized as the authoritative guide to current treaty law and practice." Restatement (Third) of Foreign Relations Law Part III, introductory note, *citing* 1st S. Exec. Doc. L., 92d Cong., 1st Sess. (1971) p. 1.

To accord with the object and purpose of the Protocol, the Section 243(h)(2)(C) exception to the general obligation to withhold deportation for those facing persecution must be interpreted narrowly. The object and purpose of the Protocol is to ensure the protection of persons facing persecution in their countries. In many cases, the consequences of denying an individual that protection will be severe: the return of an individual to a country where he or she has a clear probability of being killed, tortured or subject to other persecution. The Respondent faces such consequences if returned to Guatemala. Petitioner's Cert. Brief at App. 7. Accordingly, provisions for the exclusion of individuals from the protection of the Protocol should be interpreted and applied narrowly. *See* The United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees,*[7] ¶ 149 (the UNHCR *Handbook*) ("considering the serious consequences of exclusion for the person concerned, . . . the interpretation of these exclusion clauses must be restrictive").[8] This approach recognizes that "[d]eportation is always a harsh measure [and] is all the more replete with danger when the alien makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country." *Cardoza-Fonseca,* 480 U.S. at 449.

[7] The UNHCR *Handbook* was issued for the guidance of Governments in determining refugee status, in response to a request by the Executive Committee of the High Commissioner's Programme at its twenty-eighth session. *Id.* at ¶¶ IV, VII.

[8] The member states of the European Union (EU) have agreed that "[i]n view of the serious consequences of such a decision for the asylum-seeker, Article 1F must be used with care and after thorough consideration, and in accordance with the procedures laid down in national law." Council of the European Union's Joint Position on the Harmonized Application of the Definition of the Term 'Refugee' of March 1996, ¶ 13, E.U. Doc. No. 96/196/JTA (1996). The Joint Position is a document setting out the shared understanding of EU countries of the minimum obligations imposed under Article 1 of the Convention and Protocol. As the Joint Position is an expression of the postratification understanding of 15 of the contracting parties to the Protocol, it may be relied upon as an aid to interpretation. *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996).

Finally, interpretation of the statute should also abide by the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *Cardoza-Fonseca,* 480 U.S. at 449; *INS v. Errico,* 385 U.S. 214, 225 (1966).

The Court of Appeals interpreted Section 243(h)(2)(C) in accordance with these rules of interpretation, and consistently with the Protocol. The court therefore gave effect to the intent of Congress, as it was required to do. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843, n.9 (1984); *see also Cardoza-Fonseca,* 480 U.S. at 445-448. Its interpretation of Section 243(h)(2)(C) is correct as a matter of law.

II. AN ACT SHOULD BE CONSIDERED A SERIOUS NONPOLITICAL CRIME ONLY IF IT IS GRAVE AND GROSSLY OUT OF PROPORTION TO ANY POLITICAL OBJECTIVE.

To interpret Section 243(h)(2)(C) consistently with the Protocol requires the conclusion that an act will only fall within the serious nonpolitical crime provision if it is grave and, if committed for a political objective, grossly disproportionate to that objective.

A. An Act Must Be Very Grave to Qualify as a "Serious" Crime.

The question whether an act is a serious crime cannot be answered in the abstract. Rather, the proper question, in the context of Section 243(h)(2)(C), is whether the crime is sufficiently serious to justify returning the individual to face persecution.

When the question is phrased in this way, the answer must be that only a very grave act will constitute a "serious" crime under Article 1F(b), and therefore under Section 243(h)(2)(C). The UNHCR *Handbook* states:

> [A] 'serious' crime must be a capital crime or a very grave punishable act. Minor offences punishable by moderate sentences are not grounds for exclusion under Article 1F(b) even if technically referred to as 'crimes' in the penal law of the country concerned . . . . In evaluating the nature of the crime presumed to have been committed, all the relevant factors—including any mitigating circumstances—must be taken into account.

¶¶ 155, 157.

The UNHCR *Handbook* is an important interpretative tool. As this Court has recognized, "the Handbook provides significant guidance in construing the Protocol to which Congress sought to conform . . . . [and] has been widely considered useful in giving content to the obligations that the Protocol establishes." *Cardoza-Fonseca*, 480 U.S. at 439, n.22 (relying upon the *Handbook*'s analysis of the Protocol to interpret the phrase "well-founded fear" despite noting that the *Handbook* did not have the force of law). Mr. Justice Blackmun, concurring in that case, made it clear that the UNHCR *Handbook* was an appropriate reference, and should play a significant part in the interpretation of the statute by the agency. *Id.* at 450-51.[9]

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[9] Moreover, the Department of Justice, of which the Petitioner is part, has noted the likelihood that Congress intended the set of standards enunciated in the Handbook to serve as an interpretive guide to the Refugee Act of 1980: 'We assume that Congress was aware of the criteria articulated in the Handbook when it passed the Act in 1980, and that it is appropriate to consider the guidelines in the Handbook as an aid to construction of the Act.' *U.S. Refugee Program: Oversight Hearings Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 24, 26 (1981) (Memorandum from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, to David Crossland, General Counsel, Immigration and Naturalization Service).

This Court has found the opinions of expert commentators to be persuasive in the interpretation of international treaties on numerous occasions, including in the interpretation of the Protocol. *See Sale*, 509 U.S. at 182; *Cardoza-Fonseca*, 480 U.S. at 432, 440; *see also El Al Israel Airlines, Ltd. v. Tseng*, No. 97-475, 1999 WL 7724, at *9 (U.S. Sup. Ct. Jan. 12, 1999); *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 228 (relying on opinion of expert commentators on the Warsaw Convention governing international air transportation to determine meaning of that Convention). The opinion of expert commentators unanimously support the UNHCR Handbook's interpretation of the term "serious". *See* Guy S. Goodwin-Gill, *The Refugee in International Law*, 105 (2d ed. 1996) ("Commentators and jurisprudence seem to agree . . . that serious crimes are those against physical integrity, life and liberty."); *accord* James C. Hathaway, *The Law of Refugee Status*, 224 (1991) (stressing "the Convention's commitment to the withholding of protection only from those who have committed truly abhorrent wrongs"); Nehemiah Robinson, *Convention Relating To The Status Of Refugees: Its History, Contents And Interpretation*, 68 (1953) ("[Under Article 1F(b)] the person involved is assumed to be a common criminal. . . . [O]nly grave infractions (murder, theft, and like) would come under subsec. (b) while lesser crimes and administrative infractions (for instance traffic violations and the like) could not be regarded as a reason for exclusion.").

In light of this interpretation, the INS's suggestion that the term "serious" be interpreted to mean "causing distress, anxiety or inconvenience" is plainly incorrect. Petitioner's Brief on Merits at 35. Any trivial offence would meet this standard. Such a standard is clearly contrary to the Protocol, and, therefore, to the intent of Congress.

B. Where an Act Is Committed for a Political Objective, That Act Must Be Grossly Disproportionate to the Political Objective to Constitute a Serious *Nonpolitical* Crime as a Matter of Law.

The next question is: In what circumstances will an act committed for a political objective nevertheless be considered a *nonpolitical* crime?

The answer was provided in *McMullen v. INS*, 788 F.2d 591 (9th Cir. 1986). Where an act is committed for a political purpose, that act must be grossly disproportionate to the political objective sought in order to constitute a serious *nonpolitical* crime. Reference to the Protocol indicates that this test is consistent with its language, object, and purpose. *Id.* at 596.

First, the Protocol does not require that all acts committed for political purposes be treated as political crimes. This would require States to extend the protection of the refugee regime to those who had committed truly heinous and atrocious crimes, such as the bombings, murders and torture in which McMullen and his organization were involved. *Id.* at 597. To extend protection to such persons is contrary to the object and purpose of the Protocol—the protection of persons from persecution. Therefore there must be a point beyond which the crime is rendered nonpolitical as a matter of law, regardless of motivation.

On the other hand, the plain language of the Protocol and the statute make it clear that the fact that a crime is serious cannot be sufficient to render it *ipso facto* nonpolitical as a matter of law. "The explicit exclusion of persons who have committed nonpolitical crimes implies that individuals who have been accused of or even committed serious *political* crimes may qualify as refugees." *Dwomoh v. Sava*, 696 F. Supp. 970, 978 (D.N.Y. 1988) (emphasis added). Therefore the U.S. would be in contravention of its obligations under the Protocol if it were to exclude a person who committed a crime for a political purpose merely because that crime was "serious." Some

higher standard must be required to "depoliticize" the crime as a matter of law.

The test provided by *McMullen* strikes the correct balance. In the words of the court in *McMullen*, "[a] balancing approach including consideration of the offense's 'proportionality' to its objective and its degree of atrocity makes good sense." *Id.* at 596, *referring to* Guy S. Goodwin-Gill, *The Refugee in International Law*, 61 (1st ed. 1983). It provides an appropriate test to ensure that the U.S. is not required to extend protection to persons whose acts are so disproportionate to the political objectives sought that the crime is not legitimately political in nature. At the same time the test is in keeping with the obligation of the U.S. under the Protocol and Section 243(h)(2)(C) to withhold deportation for those who have committed a crime which, although serious, is genuinely political in nature. The *McMullen* test accords with the UNHCR *Handbook*. *See* UNHCR *Handbook*, ¶ 152 [10]; *see also* Goodwin-Gill, *The Refugee in International Law*, 105 (2d ed. 1996).

To summarize, where an individual commits a criminal act for a political purpose, there are three possible ways in which that act might be characterized. First, that act may not constitute a serious crime, in which case the

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[10] The full statement of the UNHCR *Handbook* on the issue is contained in ¶ 152:

> In determining whether an offence is "non-political" or is, on the contrary, a "political" crime, regard should be given in the first place to its nature and purpose i.e. whether it has been committed out of genuine political motives and not merely for personal reasons or gain. There should also be a close and direct causal link between the crime committed and its alleged political purpose and object. The political element of the offence should also outweigh its common-law character. This would not be the case if the acts committed are grossly out of proportion to the alleged objective. The political nature of the offence is also more difficult to accept if it involves acts of an atrocious nature.

prohibition does not apply. Second, that act may constitute a serious political crime, in which case the prohibition also does not apply. Third, that act may be of a magnitude and gravity that is grossly disproportionate to the individual's political motivation and objectives, and so more properly be characterized as a serious *non-political* crime as a matter of law. Only in this case does the prohibition apply.

The application of the *McMullen* test requires a consideration of the Respondent's political objectives in committing the acts, and the context in which those acts took place. The first step is to determine whether the relevant act "was committed out of genuine political motives or merely for personal reasons or gain." Goodwin-Gill, *The Refugee in International Law*, 105 (2d ed. 1996); *concur* Hathaway, *supra*, at 174. There is no dispute that the Respondent had genuine political reasons for the acts he committed; the BIA accepted that the Respondent's acts were politically motivated.[11]

The next step is to examine the Respondent's political objectives. In this case the INS does not dispute that the Respondent's objectives included protesting, and seeking to bring an end to, the extrajudicial deaths and disappearances of Guatemalan citizens, including fellow students. These were unquestionably grave violations of fundamental human rights of concern to the populace as a whole. Moreover, despite previous protests and opposition, "[m]any human rights cases . . . remained unsolved, such as . . . the disappearance and murder of university

[11] The BIA accepted that the Respondent had an organizing role in the Estudeante Syndicado (ES), a student group, that he "engaged in demonstrations against the Guatemalan government," and that the "primary source of [the ES's] displeasure with government arose from its seeming inaction in the investigation of student deaths and in its raising of student bus fares." Petitioner's Cert. Brief at App. 13-17. There was clearly no personal motivation or gain. See Petitioner's Cert. Brief at App. 5.

students." *Dept. of State Country Reports on Human Rights Practices for 1991*, 613 (1992). *See also Dept. of State Country Reports on Human Rights Practices for 1989*, 599, 601-02 (1990) (discussing abductions and disappearances in 1989 of university students, six of whom were found dead); Lawyers Committe for Human Rights, *Critique: Review of the Department of State's Country Reports on Human Rights Practices for 1900*, 93 (1991) ("[P]articular targets [were] university students, who continued to disappear and then reappear, murdered. Of five who disappeared within the first four months of 1990, three were later found on roadsides, victims of torture and murder."). On any assessment, the Respondent's political objectives were extremely valid and important ones. The Court of Appeals was correct in holding that the BIA's decision was erroneous as a matter of law in failing to consider and weigh these objectives in any meaningful manner. Petitioner's Cert. Brief at App. 5.

In applying the *McMullen* test, the decision maker must also take into account the political context in which the acts were committed. Those circumstances determine the avenues available for persons to express their political opinion. *Dwomoh*, 696 F.Supp. at 974-5, 979.[12] In many cases, applicants are seeking protection from persecution because they have expressed opposition to a government that does not permit the fundamental human right to peaceful expression of political opinion. In such cases, political expression necessarily takes on forms that would be considered inappropriate and unnecessary in a society in which freedom of political expression is respected and

[12] The court held that the BIA erred in not "considering the fact that in totalitarian governments a person may have only one chance to express or act upon anti-government views," and that "the only means of effecting political change" may be to engage in political acts which would be illegitimate in a democratic country. (Petitioner in the *Dwomoh* case was an activist who had participated in a coup to overthrow the dictatorship government in Ghana).

upheld. To deny protection to persons who engage in such forms of political expression is to deny protection to some of the persons who need it most, and to undermine the protection function of the Protocol and Section 243(h).

This country's history provides an example of the importance of reference to the political context in determining whether acts committed for political purposes are in fact genuinely political in nature. One of the earliest and most prominent incidents of political protest in the history of this country, the Boston Tea Party, is an example of political expression and protest through destruction of property. By contemporary U.S. standards, the commission of such acts to protest high levels of taxation would be clearly unacceptable. However to the protestors, denied any peaceful and effective means of political expression, this was the only means available to meaningfully express opposition to a policy of immense concern imposed by a despotic and unresponsive government. In that context, the acts committed were not grossly disproportionate to the political objectives that motivated them.

Finally the assessment must be made—were the acts grossly disproportionate to the political objectives? The Court of Appeals concluded that the BIA committed an error of law in not asking this question, as it was required to under *McMullen*. Petitioner's Cert. Brief at App. 4-6. The BIA decision discloses no analysis of the Respondent's political objectives. This subject is mentioned in one sentence of the BIA decision, which contains no analysis and no findings on the weight of those objectives.[13] Nor is there any consideration of the political context of Guatemala at that time. The Court of Appeals decision was correct.

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13 "The respondent testified that the primary source of their displeasure from the government [sic] arose from its seeming inaction in the investigation of student deaths and in its raising of student bus fares." Petitioner's Cert. Brief at App. 5.

A decision to return a person to face persecution for acts that were committed in the course of taking a stand against grave violations of human rights cannot be taken lightly. Where an individual carries out an act for political reasons, such act will only be *nonpolitical* as a matter of law if it is so serious that it is grossly out of proportion to the individual's political objectives. The application of any lesser standard is contrary to the Protocol, and therefore to Section 243(h)(2)(C).

III. APPLICATION OF THE SERIOUS NONPOLITICAL CRIME EXCEPTION REQUIRES A BALANCING OF THE SEVERITY OF THE CRIME AGAINST THE PERSECUTION FEARED ON RETURN.

Before an individual may be excluded from the protection of the Protocol under the "serious nonpolitical crime" exception, the severity of the crime must be balanced against the degree of persecution the applicant faces if returned to his or her country. This test recognizes that for some individuals, exclusion from the protection of withholding of deportation contained in Section 243(h)(1) will mean return to persecution that may be certain and extreme. Where the persecution feared is particularly severe, the crime must be exceptional in character to justify excluding an individual from protection. The test enables an individualized decision to be made, rather than the automatic application of an inflexible bar. In a sense, it is acknowledgement that the "punishment" of denial of protection will be far greater for some than for others, even where their crimes are objectively similar in seriousness.

The UNHCR *Handbook* states:

> In applying this exclusion clause, it is also necessary to strike a balance between the nature of the offence presumed to have been committed by the applicant and the degree of persecution feared. If a person has well-founded fear of very severe persecution, e.g. persecution endangering his life or freedom, a crime

> must be very grave in order to exclude him. If the persecution feared is less serious, it will be necessary to have regard to the nature of the crime or crimes presumed to have been committed in order to establish whether the applicant is not in reality a fugitive from justice or whether his criminal character does not outweigh his character as a *bona fide* refugee.

¶ 156.

The Court of Appeals relied on the UNHCR *Handbook*'s statement in holding that the BIA committed an error of law as it "did not attempt to balance [the Respondent's] admitted offenses against the danger to him of death if returned to his native land." Petitioner's Cert. Brief at App. 7.

There is universal support for the balancing test in the overall object and purpose of the Protocol, the statements of the drafters of the Convention, and in the opinions of expert commentators.[14]

The drafters of the Convention clearly intended that a balancing process be applied in the application of Article 1F(b). The President of the Conference stated: "[w]hen a person with a criminal record sought asylum as a refugee, it was for the country of refuge to strike a balance between the offences committed by that person and the extent to which his fear of persecution was well-founded."[15] The statements of the drafters are an important basis for interpreting the Protocol, as this Court has recognized. *Sale*, 509 U.S. at 186.

[14] Each of these are sources which may properly be relied upon in interpreting a treaty. See Vienna Convention on Law of Treaties, Art. 31(1) (stating that a treaty must be interpreted "in light of its object and purpose"); *Air France v. Saks*, 470 U.S. 392, 396 (1985) (relying on statements of drafters in interpreting the Vienna Convention governing international air transportation); *Zicherman*, 516 U.S. at 228 (relying on fact that "expert commentators [were] virtually unanimous" in interpreting Vienna Convention governing international air transportation).

[15] Statement of the President of the Conference, Conference on Territorial Asylum, U.N. Doc. A/CONF.2SR.29, at 23, July 19, 1951, *as cited in* Hathaway, *supra* at 224, n.226. *See also* Statement of Mr. Larsen of Denmark, Conference on Territorial Asylum, U.N. Doc. A/CONF.2/SR.24, at 13, July 17, 1951, *Id.* at 225, n.227.

The fact that expert commentators are unanimous in their agreement on this point is also persuasive.[16] *See Zicherman*, 516 U.S. 217. Further, there is clear and significant State practice adopting the balancing test, as all 15 Member states of the E.U. have agreed that application of Article 1F(b) of the Protocol requires a balancing process. The Council of the European Union's Joint Position on the Harmonized Application of the Definition of the Term 'Refugee' of March 1996, ¶ 13.2, E.U. Doc. No. 96/196/JHA (1996).[17]

The balancing process also accords with the overall object and purpose of the Protocol: the protection of individuals from persecution. The balancing process provides a degree of flexibility, in accordance with Congress' intent that a flexible approach to withholding of deportation be taken to ensure the extension of protection to those requiring it. *Cardoza-Fonseca*, 480 U.S. at 449 ("In

[16] "[A] balance must . . . be struck between the nature of the offence presumed to have been committed and the degree of persecution feared. A person with a well-founded fear of very severe persecution, such as would endanger life or freedom, should only be excluded for the most serious reasons." Goodwin-Gill, *The Refugee in International Law*, 106-107 (2d ed. 1996). *Accord* Hathaway, *supra* 224-5 ("[T]he risks associated with exclusion from refugee status must not outweigh the harm that would be done by returning the applicant to face prosecution or punishment . . . . [T]he decision-maker needs to consider the facts of the claim. If the gravity of harm feared by the applicant outweighs the significance of her criminal activity, she is not appropriately excluded under this clause."); Atle Grahl-Madsen, *The Status of Refugees in International Law*, 298 (1966).

[17] ¶ 13.2 provides "[In applying Article 1F(b)] [t]he severity of the expected persecution is to be weighed against the nature of the criminal offence of which the person concerned is suspected."

enacting the Refugee Act of 1980 Congress sought to 'give the United States sufficient flexibility to respond to situations involving political or religious dissidents and detainees throughout the world.'" *citing* H.R. REP. No. 908, 96th Cong., 1st Sess. 9 (1979)). Without the flexibility provided by the balancing test, persons presumed to have committed a crime which, although serious, was not heinous in nature, would be returned, even if they were certain to face torture or death at the hands of a repressive regime.

Failure to adopt a balancing test also means that the petitioner may never have an opportunity to place before the decision maker evidence of the situation he or she would face if returned to his or her country. In a withholding of deportation matter, the decision maker could hold that the applicant was ineligible for withholding of deportation under Section 243(h)(2)(C) without first considering whether or not there was probable cause that the applicant faced a threat to life or freedom if returned to his or her country under Section 243(h)(1). Contrary to the INS's assertion that a balancing test would involve "counting the persecution factor twice," failure to balance means that in some cases evidence as to persecution will never be considered. Petitioner's Brief at 26.

The INS neglects to mention in its brief that the BIA has applied the balancing test in a number of instances. *See Matter of Rodriguez Palma,* 17 I. & N. Dec. 465 (BIA 1980) (applying a balancing process and determining that the applicant should be excluded); *Matter of Ballester-Garcia,* 17 I. & N. Dec. 592 (BIA 1980). *See also Matter of Pula,* 19 I. & N. Dec. 467, 474 (BIA 1987) (holding that balancing should apply when considering discretionary grant of asylum). The BIA's only statement rejecting the balancing test in relation to Section 243(h)(2)(C), in *Matter of Rodriguez-Coto,* 19 I. & N. Dec. 208 (BIA 1985), was dictum as the case did not involve interpretation of that section.

As Congress intended that Section 243(h)(2)(C) be interpreted consistently with the Protocol, the balancing test must be conducted before arriving at a decision under that section. The statutory format of Section 243(h) poses no barrier to an application of the balancing process. Interpretation and application of the phrase "serious nonpolitical crime" necessarily requires some exercise of judgment on the part of the decision maker. It is not only appropriate but necessary for the decision maker, in exercising that judgment, to take into account the consequences for the applicant on return in reaching a determination as to whether, in the circumstances, an act constitutes a serious nonpolitical crime.

The need to consider balancing factors in the application of bars to protection was articulated persuasively by a member of the BIA in the context of an asylum matter:

> If one accepts the proposition that the asylum process by its very nature is meant to provide refuge to persons whose lives or freedom are in danger, then it hardly seems advisable to provide a process which specifically permits an immigration judge or this Board to bar any evidence of the harm the applicant might face. *If for instance, an individual faced the possibility of death, or torture and inhuman treatment, would we not want to know this before deciding to deny asylum in discretion, even where the individual has committed a particularly serious offense?* [18]

Failure to apply the balancing test in a claim for withholding under Section 243(h)(2)(C) is contrary to the Protocol, as interpreted by reference to legitimate interpretative sources. A failure to balance is therefore con-

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[18] Member Heilman, concurring in *Matter of Gonzalez,* 19 I & N Dec. 682, 687 (BIA 1988) (emphasis added) (holding that even though Applicant had been convicted of particularly serious crime, full evidentiary hearing on the merits of the claim was necessary in order to determine if asylum should be granted in the exercise of discretion).

trary to the intention of Congress that Section 243(h)(2)(C) be interpreted consistently with the Protocol. Accordingly, the Court of Appeals decision that the BIA committed an error of law in failing to balance the Respondent's acts against the persecution he would face on return should be upheld.

CONCLUSION

For the reasons stated above and in the Respondent's brief, the Court should affirm the decision of the court below.

Respectfully submitted,

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IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

v.

JUAN ANIBAL AGUIRRE-AGUIRRE,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

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I. INTRODUCTION[1]

A critical question in this case is whether the Board of Immigration Appeals [hereinafter "Board"] correctly determined that student protests involving bus burning and related activity were serious "nonpolitical" offenses disqualifying Guatemalan former student activist Juan Aníbal Aguirre-Aguirre [hereinafter "Aguirre"] from protection against persecution. Consideration of relevant Guatemalan history and political conditions leads inescapably to the conclusion that Aguirre's actions were a form of political protest, not common criminal behavior. But the Board did not consider Guatemalan political conditions. The Board evaluated Aguirre's actions in a vacuum, as if application of controlling legal standards would be the same whether the protests occurred in Guatemala or anywhere else in the world.

Courts and the Board have consistently stressed the importance of background conditions in deciding persecution cases.[2] The test which has been adopted by the

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[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

[2] *Coriolan v. INS*, 559 F.2d 993, 1002-1003 (5th Cir. 1977); *Matter of Exame*, 18 I&N Dec. 303, 305 (BIA 1982); *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987); *Matter of Dass*, 20 I&N 120 (BIA 1989); *Matter of Chang*, 20 I&N 38 (BIA 1989); *Ramirez-Rivas v. INS*, 899 F.2d 864, 870 (9th Cir. 1990); *Matter of T*, 20 I&N 571 (BIA 1992); *Osorio v. INS*, 18 F.3d 1017 (2d Cir. 1994); *Cordero-Trejo v. INS*, 40 F.3d 482 (1st Cir. 1994); *Matter of S.M.J.*, Int. Dec. 3303 (BIA 1997). Credibility determinations also depend on the plausible context of country conditions. 8 C.F.R. 208.16(b)

Board in determining what is a "serious nonpolitical crime"[3] *requires* an assessment of country conditions and cannot be applied in a vacuum. Relevant factors, such as political motive, proportionality to political objectives, and political legitimacy of the protestor's conduct depend on contextual evidence.[4] Aguirre sought to

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and 208.13(a) (1995) [regulation in effect throughout Aguirre's proceedings, discussed in *Cordero-Trejo v. INS*, 40 F.3d at 491].

[3] As detailed in Respondent's Brief, the Board in *Matter of McMullen* set forth the standard for determining a "serious nonpolitical crime" under 8 U.S.C. 1253(h)(2)(C)(1994): "[i]n evaluating the political nature of a crime, we consider it important that the political aspects outweigh its common-law character. This would not be the case if the crime is grossly out of proportion to the political objective or if it involves acts of an atrocious nature." *Matter of McMullen*, 19 I&N Dec. 90, 98 (BIA 1984), *aff'd*, 788 F.2d 591 (9th Cir. 1986). This language is nearly identical to language in Paragraph 152 of the United Nations High Commissioner for Refugees' *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (Geneva, 1979). The Ninth Circuit subsequently affirmed this interpretation: "a 'balancing approach' including consideration of the offense's 'proportionality' to its objective and its degree of atrocity makes good sense." *McMullen v. INS*, 788 F.2d 591, 596 (9th Cir. 1986).

[4] *Matter of McMullen*, 19 I&N Dec. at 98; *McMullen v. INS*, 788 F.2d at 597-598; UNHCR *Handbook, supra*; *Osorio v. INS*, 18 F.3d at 1029-30 (Guatemalan conditions probative of persecutor's political motives). The Board's analysis of the relationship between McMullen's actions and objectives in that seminal case relied heavily on 37 exhibits about conditions in Ireland, *Matter of McMullen*, 19 I&N Dec. at 92 n.2 and at 98. The Board also quoted a United Nations study stating that the legitimacy of a cause does not "in itself" legitimize certain forms of protest, suggesting that it *may* be relevant in

compel the government to investigate and punish those responsible for brutal assassinations of students, and to halt the authorization of extraordinary bus fare increases. The latter was not a trifling matter, but one that threatened the very survival of impoverished Guatemalans. As Guatemalan country conditions clearly indicate, Aguirre's actions were proportional to these political objectives.

This Court should uphold the decision to remand, because the Court of Appeals correctly determined that the Board did not evaluate the character of Aguirre's protests in the context of country conditions, and therefore did not properly apply its own test.

II. STATEMENT OF INTEREST

Amici are human rights, legal and other public interest organizations that work on behalf of individuals who fled persecution in Guatemala or other countries with serious human rights abuses. Amici have a strong interest in ensuring that decisions about relief from persecution

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combination with other factors. *Id.* at 99 (citations omitted). Legitimacy was directly addressed in *Matter of Izatula*, 20 I&N 149 (BIA 1990) (helping irregular armed forces overthrow a government, though unlawful, was a legitimate form of protest because of lack of opportunities for peaceful dissent in the applicant's country.) There, the Board cited a federal district court case holding that political strictures may legitimize unlawful conduct such as aiding a fellow dissident escape from prison, and that legitimacy analysis requires "[a]n accurate assessment of the political conditions existing in the particular country at the time the political crime is committed. . . ." *Dwomoh v. Sava*, 696 F. Supp. 970, 979 (S.D.N.Y. 1988). Even INS admits that context is essential. Pet. Br. at 15 and 22.

are grounded in an accurate appraisal of relevant political conditions. Particularized statements of interest are set forth at Appendix A.

III. STATEMENT OF THE CASE

Amici rely on Respondent's Statement of Facts. The issue of whether Aguirre injured civilians, however, warrants additional comment. The Immigration Judge found that Aguirre did not hurt anyone. Administrative Record [hereinafter "AR"] 54. This was based on his testimony, AR 93 (lines 10-18), which the Judge found credible. AR 51. Because the BIA did not reject the credibility determination, or identify an independent record source for contrary findings, the Court of Appeals correctly assumed that Aguirre's participation in bus burnings involved damage to property, not people – and that force was used only to protect civilians by getting them away from the buses. *See* AR 93 (lines 10-11) and *Aguirre-Aguirre v. INS*, 121 F.3d 521 at 523 and 524 (9th Cir. 1997). To the extent that inaccuracies in translation and transcription of Aguirre's testimony affect the integrity of those conclusions, the matter should be remanded to the Board to remedy.[5] Even if his protests involved more than

[5] Respondent and Petitioner disagree, for example, about whether students threw stones at buses or passengers. *See* Motion for Remand (Appendix to Resp. Br.) and Pet. Br. at 8, 13, 14, 45, 47. This disagreement turns largely on the transcription and translation of Aguirre's tape-recorded testimony in Spanish regarding the pronoun he used when testifying about throwing stones. After careful review of the oral testimony and transcripts, Amici agree with Respondent that the original transcript is in error. Moreover, the corrected transcript is more consistent with background material, discussed *infra*, about

property damage, the determination about whether they were serious nonpolitical crimes required reference to Guatemalan country conditions.

IV. SUMMARY OF ARGUMENT

The Court of Appeals correctly determined that the Board erred in applying the serious nonpolitical crime standard to Aguirre. *Aguirre-Aguirre v. INS*, 121 F.3d at 523. The Board reached the conclusion that Aguirre's protests between 1989-1992 constituted serious nonpolitical crimes without considering *any* evidence regarding conditions in Guatemala. AR 6-10 (Board decision).

Aguirre's Exhibit 2 contained four documents which revealed significant constraints on political expression in Guatemala as well as the Guatemalan government's complicity in a wide range of abuses and atrocities. AR 149-179A. Exhibit 2 supported Aguirre's claim that his actions did not constitute serious nonpolitical crimes because they were politically motivated by the government's misconduct; were targeted at the government, which was not an innocent party; were directly in response to specific government practices, such as refusal to investigate student assassinations; and were justified by the lack of meaningful opportunity for more passive forms of political expression in Guatemala.[6]

how and why bus-burning protests occurred. Bus burnings had broad popular support and were carried out by passengers, not just students, casting doubt on the notion that the two groups were in conflict.

[6] Try as INS might to show that substantial evidence supported the Board's decision, Pet. Br. at 44-48, its argument

V. ARGUMENT

GUATEMALAN HISTORY AND POLITICAL CONDITIONS DEMONSTRATE THAT AGUIRRE'S ACTIONS WERE LEGITIMATE POLITICAL PROTEST

The subjects of Juan Aguirre's protests – the Guatemalan government's abysmal failure to investigate the assassination of students and his country's conflict-ridden transportation system – as well as the form of his protest – bus burning and incidental damaging of property – had clear precedents in Guatemalan political history. Such protests occurred because these issues had become extremely significant to the Guatemalan public, whose channels for more benign forms of dissent were severely circumscribed.[7]

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necessarily fails. A determination reliant on excluding highly probative evidence can be neither "substantial" nor "on the record as a whole." *See Allentown Mack Sales and Service, Inc. v. NLRB*, 118 S. Ct. 818, 824-825 (1998) (NLRB wrong to exclude evidence that "contributes to" satisfaction of legal standard); *Motor Vehicle Manufacturers Assn, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983) ("agency must examine the relevant data"); and *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

[7] The Guatemalan background material which follows is offered to aid the Court in deciding the legal issues and underscores the significance of Aguirre's Exhibit 2. *See Regents v. Bakke*, 438 U.S. 265, 316-17, 321-24 (1978) (extra-record material regarding admissions policies of amici); *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985) (social science material about drugs and violence in schools); *Ravindran v. INS*, 976 F.2d 754, 756 (1st. Cir. 1992) (background history of ethnic conflict between Sinhalese and Tamils in Sri Lanka); *Bajwa v. Cobb*, 727 F. Supp. 53 at n.2 (D. Mass. 1989) (extra-record sources explaining facts in record about Sikhs of India).

Weaknesses of the Guatemalan Electoral System[8]

As late as 1969, when Aguirre was born in Jutiapa, Guatemala, AR 69, his country had had virtually no experience with democratically elected civilian presidents. Leaders were installed by irregular means and extended their stay by force or fraud, and the military was deeply involved, both directly and indirectly, in the nation's governance.[9] In 1954, Jacobo Arbenz Guzman was toppled in a coup d'etat which marked a turning point in Guatemalan history. Thereafter, Guatemala became increasingly militarized[10] and came to be governed primarily by death squad. Under the regime of Colonel

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[8] The sources for this general historical background section are: AR 171-179; AR 154-170; AR 150-153 (all part of Ex. 2); John Dombrowski et al., *Area Handbook for Guatemala* (1970); Alvaro Vargas Llosa and Santiago Aroca, *Riding the Tiger* (1995); Victor Perera, *Unfinished Conquest: The Guatemalan Tragedy* (1993); George Black et al., "Lucas García: The Descent Into Anarchy," *North American Congress on Latin America (NACLA) Report on the Americas*, Vol. 17, No. 1 (1983); Susanne Jonas, *The Battle for Guatemala* (1991); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995); and *Osorio v. INS*, 18 F.3d at 1023-1032.

[9] In 1839, Rafael Carrera became the first of Guatemala's dictators, ruling either directly or through puppets for the next 26 years and "set[ting] the trend of autocratic government which characterized both Guatemala and her neighbors for the next 100 years." Dombrowski, *supra*, at 25-26.

[10] Colonel Carlos Castillo Armas headed the governing junta. He was followed by Miguel Ydigoras Fuentes, a former general, toppled in another coup; Colonel Peralta Azurdia, Minister of Defense, took over until 1966, a period during which the armed opposition emerged "in response to oppression by the previous regimes," AR 176 (Ex. 2). The administration of civilian president Julio César Méndez Montenegro was "completely controlled by the military." AR 156 (Ex. 2).

Carlos Arana Osorio, "the butcher of Zacapa" [Victor Perera, *Unfinished Conquest: The Guatemalan Tragedy* (1993) at 42], approximately 15,000 people were assassinated. The military regime of Romeo Lucas García (1978-1982) ushered in a reign of terror which made Guatemala infamous. He was followed by General Angel Anſbal Guevara, General Efraín Ríos Montt, and General Oscar Humberto Mejía Victores.

In 1986, Vinicio Cerezo Arévalo was elected: "[f]or many Guatemalans, the election was viewed as a chance to set Guatemala on a new path that would liberate the country from the terror of the past." AR 156 (Ex. 2). The prediction, however, "never materialized," *Osorio v. INS*, 18 F.3d at 1026, as " . . . the military continued to be the final arbiter of political and economic change." AR 156 (Ex. 2). Although INS asserts that "freely elected civilian governments have been in power" since 1986 and that "peaceful transfers of power have been effected without violence" (Pet. Br. at 9), nothing could be further from the truth. On paper, Cerezo's civilian government restored Guatemala to the rule of law and a limited form of political pluralism. In practice, the "political opening" was a cruel hoax. Under Cerezo's administration, political violence increased. *See* discussion of human rights violations, *infra*.

Under President Jorge Serrano Elías, the situation deteriorated further, with "Guatemala again descending into a spiral of fear and violence." AR 176 (Ex. 2). In 1993, fearing an end to impunity for the human rights violations of the armed forces, Serrano suspended the Supreme and Constitutional courts to rule by decree. Ramiro de León Carpio and moderate elements of the military forced Serrano from power, and de León Carpio

was elected by Congress to serve out the term. Then, in what was widely perceived as a warning to de León Carpio, his cousin Jorge Carpio Nicolle – the head of the Unión Central Nacional party (UCN) – was assassinated by elements of the military aligned with Serrano.

Stopping Dissent: The *Desaparecidos*

Between the 1960's and the 1980's, many popular movements emerged in Guatemala, fueled by economic crisis and the impact of the civil war. Susanne Jonas, *The Battle for Guatemala* (1991). Inevitably, these movements were weakened by the human rights violations which became a persistent phenomena after the overthrow of Arbenz. Guatemala became famous for its extensive use of forced "disappearance" to silence political dissent. Indeed, it was in Guatemala that the word *desaparecido* (disappeared) was added to the international language of state violence. Duncan Green, *Guatemala: Burden of Paradise* (1992) at 33. *See* AR 159 (Ex. 2).[11] Between 1978 and 1984, over 140,000 people were killed or disappeared. AR 159 (Ex. 2). Guatemala became "an international pariah." AR 163 (Ex. 2).

Aguirre's student activism (1989-1992) spanned two administrations, Cerezo's and Serrano's. AR 70. Although the level of human rights abuses declined during the first

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[11] During Colonel Arana's regime, when Aguirre was still a child, "vigilante death squadrons composed largely of ranchers and off-duty police units" took eight thousand lives, including those of students. Perera, *supra*, at 41-42; AR 176 (Ex. 2). The Lucas García regime was responsible for "the cruelest show of violence in modern Guatemalan history." AR 176 (Ex. 2).

two years of Cerezo's administration, expectations that he could curb political violence "were short-lived." AR 176 (Ex. 2); *accord*, *Osorio v. INS*, 18 F.3d at 1026. There were "more political assassinations in 1987 than in 1985, before Cerezo took office."[12]

The culture of decades of disappearance and torture, perpetrated by security forces, was revealed to the outside world in 1989 when Guatemalan National Police brazenly kidnaped and tortured Sister Diana Ortiz, an American nun. They took her to a clandestine detention center where she was burned, beaten, sexually abused and subjected to other horrific tortures. Years later in the U.S., a federal court found General Hector Gramajo legally responsible for the brutality, because he was Cerezo's Minister of Defense from 1987 until 1990 and controlled both the National Police and a special security force that answered directly to him. *Xuncax v. Gramajo*, 886 F.Supp. at 173-175.

Torture, attacks and illegal detentions continued under Serrano's administration. AR 176-177 and AR 150 (both Ex. 2). Aside from abductions and disappearances, the official Guatemalan Human Rights Ombudsman, who the U.S. Department of State termed the "most reliable

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[12] Jonas, *supra*, at 163; AR 160 and 176 (Ex. 2); *Cordero-Trejo v. INS*, 40 F.3d at 488 (widespread use of violence as vehicle for intimidation); *Osorio v. INS*, 18 F.3d at 1023-1026 (kidnaping, death threats, wounding, disappearances, and murders of political dissidents – including students – between 1986 and 1990). As "security forces continued to assassinate, disappear and harass," AR 176 (Ex. 2), Cerezo dismissed charges of human rights abuses, going so far as to claim that the incidents arose from family-related violence. AR 159 (Ex. 2).

source of objective information," listed 304 political killings in 1990 and 258 in 1991.[13] The same proportion of deaths in the U.S. population of 1998 would equal more than 7,500 political murders in one year.[14] Such violence did not escape Jutiapa, where Aguirre lived.[15] Guatemala's popular movements were weakened by their "continuing vulnerability to the endless stream of kidnappings, disappearances, death threats, and assassinations." Jonas, *supra*, at 186.

How the Students Resisted

Perhaps because of the extremism which ruled Guatemala and the pervasiveness of human rights abuses, students were deeply engaged in Guatemalan politics.[16]

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[13] U.S. Department of State, *Country Reports on Human Rights Practices for 1990*, at 632, and *Country Reports on Human Rights Practices for 1991*, at 614, 620-621.

[14] *See* World Bank, *Poverty, World Development Indicators* (1990), at 228 and U.S. Department of Commerce, *Statistical Abstract of the United States: The National Data Book*, 117th ed. (1997) (In 1998, the lowest range for the population projections of the U.S. was 268.4 million).

[15] App. B-2, B-8, C-5. (The Appendix includes translations of Spanish-language articles from Guatemala; their original text in Spanish is being lodged with the Court, together with the translator's signed certification.)

[16] They demonstrated during the 1920's against the dictator Estrada Cabrera (App. C-27) and were key in political battles of the 1940's – when the University of San Carlos community (USAC) launched the national strike that led to dictator Ubica's overthrow. AR 168 (Ex. 2); Dombrowski, *supra*, at 32. Students helped topple the military junta led by Ponce in 1945. App. C-27. In the 1950's, the law school at USAC was involved in

Students participated in numerous demonstrations concerning human rights and social justice. For example, 5,000 students and farmers marched in Guatemala City in 1990 demanding "an end to military-police human rights violations."[17] These were issues Aguirre and fellow students in Jutiapa were also protesting at the time. AR 71-72, 80-81, 99.

University students were at the vanguard of the movement, AR 168 (Ex. 2), although secondary school students figured prominently as well. AR 169 (Ex. 2) and App. C-27 (large numbers protested fraud over Congressional elections in 1962 and organized a strike in 1988).

The Price of Student Protest

Under the military regimes that ruled after the 1954 coup, as well as nominally civilian regimes controlled by the military, the student movement suffered.[18] In one

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publishing critiques of the Arbenz government before his overthrow. AR 168 (Ex. 2).

[17] Reese Erlich, "Guatemalan Civilians Talk Peace, Nudge Reluctant Military," *Christian Science Monitor*, September 26, 1990.

[18] App. C-27. During Ydigoras' administration, security forces invaded USAC law school and killed three students during their annual *Huelga de Dolores* (strike of sorrows). *Id.* University buildings were shot at by land and by helicopter. *Id.* During the administration of Colonel Arana, security forces prevented paraders from leaving the university during the *Huelga*. AR 169 (Ex. 2). In 1978, the former dean of the USAC law school was machine-gunned to death and two student leaders executed. App. C-27. Violence and brutality decimated the student movement during the Lucas García and Ríos Montt regimes. *Id.* and AR 168 (Ex. 2).

incident in 1980, several university students were killed *for reading* a list of grievances at a foreign embassy: "[i]gnoring the Embassy's sovereign immunity, the police burned the building, leaving just two survivors, the Spanish Ambassador and one of the farm workers" participating in the protest. The injured farmworker was kidnaped from a hospital and his tortured body was found the next day on the USAC campus – as a lesson. App. C-27. *See also Young v. INS*, 759 F.2d 450, 452 (5th Cir. 1985) (former USAC activist seized by Guatemalan secret police during a meeting at the university in 1981, then taken to a clandestine detention center and beaten).

Politically motivated violence against students increased during Cerezo's administration. Students reported a multitude of death threats, were beaten unconcious in front of neighbors, were taken away in cars, and were abducted in view of passing police.[19]

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[19] *Osorio v. INS*, 18 F.3d at 1024-1026; AR 160 and 169 (Ex. 2) (wave of student disappearances and deaths in 1989; entire governing council of AEU nationwide university students association killed, disappeared, exiled, or in hiding; the killings seemed "designed by the army as a reminder to students that their activities were being closely watched"); AR 150 (Ex. 2) (five students apparently executed by government officials). Jonas, *supra*, at 163 (students among groups targeted by a "macabre 'message system,' in which ultra right death squads and/or security forces . . . acted against specific individuals in order to intimidate entire constituencies"); Tom Gibb, "A Surge of Political Kidnappings, Slayings in Guatemala," *The San Francisco Chronicle*, Sept. 23, 1989 (students active in anti-government organizations kidnaped); Marjorie Miller, "Rightists Blamed for Wave of Violence in Guatemala," *Los Angeles Times*, Sept. 26, 1989 (death threats); Amnesty International, *Reports Regarding Guatemala from Jan.-Dec. 1989*

Students were also brutally targeted in Jutiapa, where Aguirre lived. App. C-1. Throughout his life, Aguirre was surrounded by evidence of government violence against students, and it became one of two main reasons for his protests. AR 71-72, 80-81, 94.

Avenues for students to engage in political protest were exceptionally narrow. To change the practices of their government they faced numerous obstacles:

- They were attacked during meetings and their meeting places were bombed or placed under surveillance.[20]
- They were beaten and shot at or harassed during parades, at demonstrations or in other public fora in which they might express themselves.[21]

(1990) at 105 (abductions in view of police); Amnesty International, *Guatemala: The Human Rights Record* (1987) at 26-27, 113-115, 215-217; and the Center for Human Rights and Constitutional Law and Guatemalan Support Network, *Crisis Point: Human Rights in Guatemala Under President Serrano, Jan. 1991 to July 1992* (1992) at 71-74 (detailed lists of disappeared, kidnaped, and abducted students).

[20] *Young v. INS*, 759 F.2d at 759; App. C-8, C-9, C-10, C-12, C-19, C-22, C-23; U.S. Department of State, *Country Reports for Human Rights Practices for 1992*, at 408; App. C-27 (offices bombed 1992); *Crisis Point, supra*, at 71.

[21] *Country Reports for 1992, supra*, at 408; AR 169 (Ex. 2), App. C-2, C-13, C-11, C-12, C-20 (harmed while preparing for or engaging in parades such as *Huelga de Dolores*); App. C-3, C-14, C-15 (students harmed, threatened or interfered with while attempting to demonstrate); Amnesty International, *Guatemala: Human Rights Violations under the Civilian Government* (1989) at 17 (student killed moments after he addressed public rally); App. C-27 (1980 events); "News Around the World," *The Dallas Morning News*, April 1, 1990 (three university students slain in April 1990, after they set out to collect funds for the *Huelga*).

- Their other efforts to organize or engage in relatively peaceful political activities were met with violence or recalcitrance by the authorities.[22]

The *Disturbios* of the 1970s, 80s and 90s

The bus burnings in which Aguirre participated between 1989 and 1992 were not uncommon phenomena in Guatemalan history. *Disturbios* (disturbances) of this nature originated some twenty years earlier. App. B-1 and B-12. Such events were widespread, drawing support from students, passengers, *campesinos* (peasants) and workers, and becoming regular phenomena on the Guatemalan political landscape. App. C-30, C-29, C-28, C-31, B-1; Jonas, *supra*, at 181.

Such disturbances were inextricably linked to the disintegration of human rights and basic economic order which ordinary Guatemalan citizens could not escape. One source attributed the 1970s *disturbios* against bus rate increases to the crisis of the Guatemalan economy as well as the use of force by National Police to thwart peaceful

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[22] App. C-21 (students putting on human rights play in 1992 received bomb threat); App. C-24 (students who took legal action against security forces for killings received death threats); App. C-6 and C-7 (students who gave human rights evidence to U.N. Commission harassed by police); *Amnesty International Report* (1979) (efforts to negotiate rebuffed); AR 169 and App. C-23 (newspapers and other publications suppressed).

protest – which escalated the violence. App. B-1; *see also* "Lucas García: The Descent Into Anarchy," *supra*, at 20-21. Similarly, another commentator noted regarding protests against the 1985 bus fare and price increases, that "[a]lthough the initial call was for peaceful demonstrations, the government's violent response provoked bus burnings and riots on a scale not seen since October 1978." Jonas, *supra*, at 181. *See also* App. C-27 (1994 protests).

The People Versus the *Transportistas*

Why and how the political sentiments of students, peasants, workers and passengers became manifest in the burning of buses had a great deal to do with the Guatemalan public's valid perception of the transportation system as a microcosm, in its abuse of power, of the country as a whole.

The buses were privately owned by a cadre of powerful companies, the *transportistas*, which generated profits derived from fares, direct government subsidies, special government subsidies for students, and a separate government subsidy for fuel. App. B-11, B-3, B-6, B-4, B-14, B-7, B-9, B-12, C-29, C-28, C-30. The *transportistas* systematically ignored essential repairs and allowed vehicles to be operated under unsafe and dangerous conditions. App. C-29 (*transportistas* kept buses in permanent disrepair, encouraged overloading and dangling of riders, encouraged drivers to race each other for fares, endangered passenger lives and caused accidents); App. C-28 (buses a "public hazard" – two passengers killed, a third seriously injured when driver braked suddenly, failed to

stop to attend to victims, and simply continued on his route); App. B-12 (*transportistas* haven't kept promises to improve service for twenty years, have only caused it to deteriorate); App. B-4, B-9. Guatemalan newspapers aptly characterized travel under such conditions as the passengers' "Calvary" (App. B-12, B-9) – a Roman Catholic reference to Jesus Christ's tortuous march to the site of his crucifixion while carrying a heavy wood cross and wearing a crown of thorns.

The government was extensively involved in the transportation system. Fares were regulated by municipal and national governments (App. C-28, B-11, B-6, B-3, B-4, B-10, B-1); governmental commissions and agencies evaluated the propriety of increases (App. B-3, B-11, B-1); the government provided funding for new buses (App. C-29, B-14); the Ministry of Education was responsible for oversight of the students' subsidy program (App. B-7); and the government set critical policies which affected passenger use (App. B-14 [tax exemptions to *transportistas* for capital purchases], App. C-29 [penalties for drivers and bus companies that violate transit regulations], App. B-13 [imposing fines and terminating concessions], App. B-12 [appointing ex-military officers to re-establish suspended service]).

In 1990, the Cerezo administration issued a formal decree declaring that the "collective ground transportation system of people and cargo across the entire national territory" was a service "essential for the community" which the Constitution authorized the state to guarantee. App. B-5. Cerezo's decree specifically permitted the government to intervene to restore services and repair

vehicles. *Id.* But things did not improve much, even after Aguirre left Guatemala. *See* App. C-29.

Against this backdrop, it was not surprising that rate increase proposals were fiercely and widely opposed (App. B-1, B-3, B-9, B-10, B-12); Jonas, *supra*, at 180-81. Public opprobrium was further inflamed by the extraordinary extent of fare increases, especially during the 1985-92 period when the economy was in chaos, as well as by lawless methods *transportistas* employed to finagle additional increases.

The Rate Increases Were Extraordinary

A central social characteristic of Guatemala was its extreme poverty, measured by numerous social indicators on which it ranked the worst in Central and/or Latin America (the number of infants of low birth weight, illiteracy rates, infant mortality, and overall life expectancy). Jonas, *supra*, at 178-179. The Catholic Archbishop of Guatemala City rejected the 1992 bus fare increases because of their anticipated impact on this already struggling populace. App. B-10.

In 1990, the government authorized urban rate increases of 100%, followed by 50% increases in 1992. App. B-4 and B-11. During the 1989-1992 period, bus fares increased from 10 centavos to a minimum of 60 centavos for older buses. App. B-11 and App. B-12. Also, bus routes were shortened, often requiring double fares. App. C-29. According to studies by the Guatemalan government and university institutes, this meant that a family of five had to spend 30% of their average income of 500

Quetzales for bus fare alone. App. B-14.[23] The same studies concluded that a family of five required 754.80 Quetzales for a minimum subsistence. *Id.*

The situation was worse in rural areas such as Jutiapa, in that these areas received only five percent of the government subsidy. Although rural rates were generally lower, rural poverty was greater. App. C-27. Yet in Quetzaltenango, bus owners increased fares from Q.0.25 to Q0.35 while continuing to receive a subsidy. App. B-13. In 1997, when interurban fares went up more than 50%, thousands of local *campesinos* in the outskirts of Chichicastanengo, Quiché set up burning barricades and stoned buses in protest against the increased rates. App. C-31.

The *Transportistas* Acted Lawlessly

The *transportistas* exceeded even the significant latitude provided them by the Guatemalan government. They flouted rate regulations, deceived government officials, mistreated the public and engaged in other heavy-handed tactics. In 1992, *transportistas* in the northwestern city of Quetzaltenango imposed an unauthorized 25%

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[23] Average monthly salary of most workers in 1988, before the sharp decline in their purchasing power, ranged between Q.300.00 (services and office workers) and Q. 70 (domestics). James Wilkie et al., co-editors, *Statistical Abstract of Latin America*, Vol. 34 (1997), at 356 [Table 400, Evolution of Real Wages]; *Comisión Económica Para América Latina y el Caribe, Centroamérica: Evolución de Algunas Macroeconómicas* [Central America: Evolution of Real Wages] (1996) at 36.

rate increase – even though they were receiving government subsidies to provide services and despite local congressional disapproval of such actions as illegal. App. B-13. In 1990, the head of the congressional transportation commission refused to endorse a 100% rate increase because the *transportistas* had misrepresented their costs, claiming that they bought fuel at retail prices when they received a preferential rate. App. B-3. *See also* App. B-12 (discussing the fiscal advantage exploited by *transportistas* during the 1970's by selling off more than half the fuel they were provided by the government as a subsidy).

In 1990, *transportistas* imposed a de facto rate increase of 100% on Guatemalan students by refusing to honor discount coupons which guaranteed students a reduced rate under federal law. App. B-6, B-7; "Guatemalan Students Burn Buses to Protest Fares," Reuters, Feb. 1, 1990. The refusal to honor student coupons was denounced as illegal by the Ministry of Education (App. B-7) as well as the National Middle School Teachers Association (App. B-6) and precipitated protests, including bus burnings by high school students in the capitol in 1990. "Guatemalan Students Burn Buses to Protest Fares," *supra*. *See also* App. B-8, describing machine-gunning of a middle school by private police during one such protest. Students who engaged in similar protests in 1992 and 1994 were gunned down. App. C-25, C-28, C-30.

Why the Government Was the Target

By authorizing rate increases and subsidies, notwithstanding the *transportistas'* refusal to provide safe riding conditions, by tolerating the *transportistas'* illegal acts,

and by using excessive force against students and others who protested, the Guatemalan government contributed to and was necessarily implicated in virtually any protest concerning the transportation system. But the fact that it was propping up a transportation system rife with abuse was not the only issue students had with the government.

In 1992, student protests increased in the aftermath of police killing a student and wounding 17 others. "Two Bombs Explode in Guatemala City," Agence France Presse (April 29, 1992). In the spring of that year (after Aguirre had left Guatemala), high school students in Guatemala City demonstrated by blocking traffic and burning tires over the government's failure to provide them with teachers or reasonable academic conditions. App. C-15. When dozens of minors were arrested and tortured as a result, other secondary school students demonstrated.[24] In the summer of 1993, students blocked traffic and set up barricades to protest yet another instance of governmental misconduct – police brutality against peasants. "Students Block Traffic, Protest Police Actions," *The Miami Herald* (July 25, 1992).[25]

Students were hamstrung in protesting human rights abuses in less confrontational forums because the security

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[24] "Students, Cops Battle in Streets of Guatemala," *The San Francisco Chronicle*, May 1, 1992; App. C-14, C-16, C-17, C-18.

[25] *See also* "Guatemalans Demand Explanation of Thousands of Kidnapings," Reuters, Aug. 31, 1990 (protesting kidnapings and disappearances); App. C-4 (protesting abduction of student leader); App. C-17 (protesting actions of security forces during prior student uprisings).

forces did not permit it. During the years Aguirre protested student assassinations, security forces were never held accountable for the overwhelming number of kidnapings, disappearances, abuses and killings attributed to them by international human rights organizations and other informed sources.[26] The Guatemalan government did not investigate or prosecute these incidents,[27] and

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[26] For each year Aguirre was involved in protests concerning student disappearances [AR 71-72, 80-83], the U.S. State Department attributed responsibility to Guatemalan security forces, including military and police. U.S. Department of State, *Country Reports on Human Rights Practices for 1989*, at 597; for 1990 at 632; for 1991 at 614; and for 1992 at 408. The 1991 report specifically found security forces involved in disappearances and murder of students. *Country Reports for 1991, supra*, at 613. *See also* AR 159-161 (Ex. 2).

[27] Guatemalan authorities were "either unable or unwilling to apprehend or prosecute those involved in political killings," *Country Reports for 1989, supra*, at 600, and perpetrators were "virtually never held accountable for human rights violations." *See* 1990 report, *supra*, at 632; 1991 report, *supra*, at 614; 1992 report, *supra*, at 408 ("security forces rarely held accountable for human rights violations"). *See also Cordero-Trejo v. INS*, 40 F.3d at 488 (describing lack of response by authorities). Only one police officer was prosecuted for human rights offenses during 1988-1990. The Americas Watch Committee, *Messengers of Death: Human Rights in Guatemala, November 1988-February 1990* (1990), at 73-74. In 1995 the United Nations Human Rights Verification Mission in Guatemala (MINUGUA) found that "[i]mpunity is the most serious obstacle for the respect of human rights in Guatemala." The UN Report confirmed that grave human rights violations "almost in their entirety remain without response by the competent authorities." Farhan Haq, "Guatemala: U.N. Agency Finds Impunity for Rights Abuses," Inter Press Service, March 13, 1995.

courts and human rights tribunals were rendered impotent by similar abuses perpetrated against participants in legal proceedings.[28] Consequently, the vehicles for changing the government's policy of tolerating, if not actually committing, human rights abuses, like the vehicles for changing other government-supported practices in Guatemala, were severely circumscribed. It was not surprising that students in Jutiapa, like students elsewhere, included the impunity issue in their protests.

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[28] Guatemala's judges were susceptible to intimidation and corruption. *Country Reports for 1990, supra*, at 637, and for 1992 at 410. There was no resolution of cases dating back since 1985 in which the U.S. had expressed strong and continuing interest – including the 1989 disappearance of 11 students at San Carlos University, six of whom were later found murdered. *Country Reports for 1990, supra*, at 632. *See also* The Minnesota Lawyers International Human Rights Committee, *Justice Suspended: The Failure of the Habeas Corpus System in Guatemala* (1990); America's Watch Committee, *Messengers of Death, supra*, at 74 (Guatemalan judiciary crippled and ineffective due to corruption and fear of military reprisal against judges and prosecutors).

Perpetrators of political killings likewise targeted human rights monitors. AR 161 (Ex. 2); The Minnesota Lawyers International Human Rights Committee, *Justice Suspended, supra*. Individuals who tried to report on human rights violations faced personal risk and were not guaranteed safety. AR 161; Amnesty International, *Guatemala: Human Rights Violations under the Civilian Government*, at 7. Guatemala was "one of the most dangerous places in the world to be a human rights activist, topping the list of murdered human rights monitors in 1990." AR 159 (Ex. 2). *See also* App. C-6 and C-7 (students threatened for testifying before human rights tribunals).

Excessive Punishment for Involvement in *Disturbios*

Students and other Guatemalans involved in *disturbios* were punished exactly like political dissidents – by irregular detention methods, physical mistreatment, torture, and even death. During the protests of 1974, police retaliated by shooting at civilians, App. B-1, a precedent repeated during the 1978 bus fare riots by the Lucas García administration. "Lucas García: Descent into Anarchy," *supra* at 21. During the 1985 bus burnings and riots, the government's violence produced twelve deaths and fifty injuries. Jonas, *supra*, at 181.

Students have been special targets of excessive violence from formal and informal security forces during these types of protests. In 1990, private police machine-gunned a high school student during a student protest over the transportation system problems. App. B-8. In April of 1992, more than 100 minors were arrested during bus burnings, window-breakings and traffic stops that broke out in the capitol in response to security forces killing a student and wounding others, as well as to academic problems which reached crisis proportions. AR 151; "Two Bombs Explode in Guatemala City," Agence France Presse, April 29, 1998. Some protesting students were beaten and left without medical assistance by order of the police. App. C-15, C-14, C-18. Thirteen-year-old Amado Estuardo López was beaten during the protest and forced to drink chlorine in detention, which caused injuries requiring surgery. AR 151; App. C-14, C-18, C-15. There was evidence that these young people were tortured: a juvenile court judge who visited the boys in detention observed that they "had match burns on their

faces and backs," contusions on their legs and complained of having had "a red powder" thrown on them which caused vomiting and allergic reactions. AR 151; App. C-16. Some students were removed to isolated locations where authorities "then threatened to kill them." App. C-17.

These forms of extrajudicial punishment were repeated in subsequent years, when students engaged in similar protests. Abner Ariel Hernández, a high school student, was gunned down, App. C-25 (photo of students carrying Hernández' coffin); police shot and killed university student Mario Alioto Sánchez López during protests in 1994, App. C-28. The long arm of repression has even reached into the United States, where students who produced a video about the Guatemalan student movement, including the events of the 1990's, have been unable to respond to e-mail messages because of fear of reprisals. App. C-26.

VI. CONCLUSION

As the conditions clearly demonstrate, in the context of Guatemalan history, it is impossible to characterize Aguirre's actions as "nonpolitical." The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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January 1999

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APPENDIX A

ORGANIZATIONAL STATEMENTS OF INTEREST

National Organizations:

Guatemala Human Rights Commission/USA

Guatemala Human Rights Commission/USA (GHRC/USA) is a non-profit, humanitarian organization founded to monitor, document and report on the human rights situation in Guatemala. GHRC/USA also promotes advocacy for and aid to victims of human rights violations. In addition to publishing a bi-weekly human rights update, GHRC/USA provides funds for Guatemalan refugees to give testimony before human rights tribunals about human rights conditions in their country, trains lay people to assist with mental health support for refugees, and works with a coalition it helped found to end torture and support survivors. GHRC/USA's projects and its constituents' rights will be affected by a decision on the issues raised in this case.

Maryknoll Office of Global Concerns – Washington DC

The Maryknoll Office of Global Concerns (MOGC) works for peace, social justice and integrity of creation through education and advocacy, in cooperation with other Maryknoll departments and other institutions and organizations. This work includes policy advocacy on human rights issues to the United Nations, the United States government, and other governments. The work of the MOGC (a collaborative ministry of the Maryknoll Sisters Congregation, the Maryknoll Fathers and Brothers and the Maryknoll Mission Association of the Faithful) also

includes education and support for Maryknoll overseas missioners, many of whom are in Central America. Because of Maryknoll's historic commitment to the human rights issues in Guatemala, it will be affected by a decision on the issues raised in this case.

Network in Solidarity With the People of Guatemala (NISGUA) – Washington DC

Network in Solidarity With the People of Guatemala (NISGUA) exists to link Guatemalan communities and people in the United States in their support for the human rights and socio-economic needs of Guatemalan people. NISGUA educates North Americans to work for justice in Guatemala, supports Guatemala's grassroots movements, and seeks to impact US policy towards Guatemala towards improving human and socio-economic rights for all Guatemalans. NISGUA's projects include sponsoring of Guatemalan grassroots leaders to speak in the United States, alerting local and national Guatemala support groups in the United States about human rights issues, campaigning for US policy forwarding peace and socio-economic development in Guatemala, and publication of informational materials. NISGUA's projects and its constituents' rights will be affected by a decision on the issues raised in this case.

Washington Office on Latin America

Washington Office on Latin America (WOLA) promotes human rights, democracy and social and economic justice in Latin America by facilitating dialogue between governmental and non-governmental actors, monitoring the

impact of policies of governments and international organizations, and promoting alternatives through reporting, education, training and advocacy. Founded in 1974 by a coalition of religious and civic leaders, WOLA works closely with civil society organizations and government officials in Latin America. WOLA's projects and the human rights of Guatemalans with whom WOLA concerns itself will be affected by a decision on the issues raised in this case.

Local Organizations:

Atanasio Tzul "Guatemala Support Network" – Houston, TX

The Atanasio Tzul "Guatemala Support Network" (GSN) serves the large Guatemalan expatriate population in the Houston, Texas area. GSN advocates for the rights of Guatemalans by working with other support groups including the Atanasio Tzul Guatemalan Refugee Network. GSN produces and distributes a monthly newsletter, initiates forums and workshops, brings Guatemalan speakers to share their experience with popular and human rights organizations, and advocates on behalf of exploited Guatemalan refugees. GSN's projects and constituents' rights will be affected by a decision on the issues raised in this case.

Central American Refugee Center (CARECEN) – Hempstead, NY

The Central American Refugee Center (CARECEN) is a non-profit organization meeting the large and growing needs of the large Central American refugee community

in the New York City and Long Island area. In addition to community education work, CARECEN represents a high volume of immigrant and refugee families in immigration proceedings, with a particular emphasis on the needs of asylum seekers. Its legal and paralegal staff work on behalf of actual and potential Guatemalan asylum-seekers whose rights will be affected by a decision on the issues raised in this case.

Central American Resource Center (CARECEN) – Los Angeles, CA

The Central American Resource Center (CARECEN) is a non-profit organization meeting the large and growing needs of the large Central American refugee community in the Los Angeles, CA area. In addition to community education work, CARECEN represents a high volume of immigrant and refugee families in immigration proceedings, with a particular emphasis on the needs of asylum seekers. Its legal and paralegal staff work on behalf of actual and potential Guatemalan asylum-seekers whose rights will be affected by a decision on the issues raised in this case.

Casa de Proyecto Libertad – Harlingen, Texas

Casa de Proyecto Libertad in Harlingen, Texas, is a non-profit organization that serves Central American refugees passing through the Texas border area. Its mission is to ensure that refugees, immigrants, and citizens receive the civil and human rights protection guaranteed to them by international and domestic law, as well as by moral and humanitarian standards. To date, Proyecto Libertad has

served over 15,000 clients, meeting their immigration legal service needs and advocating for an accountable, fair and dignified immigration system. Its staff work on behalf of actual and potential Guatemalan asylum-seekers whose rights will be affected by a decision on the issues raised in this case.

Guatemaltecos Unidos en Acción of Rhode Island (GUARI)

Guatemaltecos Unidos en Acción of Rhode Island (GUARI) is a nonprofit organization comprised of individuals and groups throughout the state of Rhode Island who are concerned about the welfare of Guatemalan immigrants and refugees, and to that end work with immigrant and refugee families to help them attain legal status, and otherwise educate and provide activities for this immigrant community. Its members work on behalf of actual and potential Guatemalan asylum-seekers whose rights will be affected by a decision on the issues raised in this case.

Guatemalan Maya Center, Inc. – Lake Worth, FL

The Guatemalan Maya Center is a community based organization dedicated to providing culturally enriched education, health care, immigration and other support services for a large number of primarily Mayan Guatemalan refugees in Southern Florida. Its multiethnic staff works to meet the many and growing needs of displaced Guatemalan refugees whose rights will be affected by a decision on the issues raised in this case.

Massachusetts Law Reform Institute

The Massachusetts Law Reform Institute is a statewide legal services center that provides advocacy, training, information and legal support for the benefit of low income people, including immigrants, on a variety of issues. These issues include asylum law and the process by which administrative agencies make decisions. MLRI has an ethnically diverse constituency representing many nationalities, including Guatemalans, and is frequently involved in matters affecting Guatemalan asylum-seekers. MLRI has been involved in cases about the effect of political conditions evidence on persecution claims and in training pro bono attorneys about using such evidence in their cases. MLRI's projects, clients and other constituencies will be affected by a decision on the issues raised in this case.

School of Law of the University of California at Davis, Immigration Law Clinic

The School of Law of the University of California at Davis established the Immigration Law Clinic in 1981 and represents indigent immigrants in deportation hearings including political asylum cases. In addition to successfully representing hundreds of Guatemalan asylum seekers, the clinic also served as co-counsel in the case of *Xuncax v. Gramajo*, 886 F. Supp. 162 (1995) in which the Clinic's clients obtained a default judgment of $47.5 million against General Gramajo in favor of the plaintiffs. The Clinic has also prepared and distributed a report on the plight of Guatemalan Mayan refugees and current conditions in Guatemala ("The Genocide of the Mayan

Indians of the Villages of Western Guatemala") and has been involved in other human rights work related to Guatemala. Its projects and cases will be affected by a decision on the issues in this case.

APPENDIX B-1

"Acute Social Unrest" [*"Aguda Convulsión Social"*] (Inforpress Centroamericana), October 5, 1978

Violent actions of protest began in Guatemala City on October 2nd and 48 hours later police forces were still unable to contain them. An increase in urban transportation fares was the cause of the protest that unleased the discontent expressed by workers from various sectors, students, and citizens, which followed an agreement reached by the President of the Republic, other executive officials, the Metropolitan Council and representatives of the transportation companies. Nevertheless, the protests are part of a period in which various methods of discontent include acts that frequently end in violence in the Capitol City as well as in the provinces and rural areas. In the interior of the country more than one municipal mayor has been forced to resign after receiving threats of being lynched. In the rural areas land disputes are common and threats of confrontations between litigants, with the consequence of army intervention, have led to well known incidents. In various cities, the inefficiency of the urban projects and of the maintenance of services, including the scarcity of drinkable water, insufficient drainage systems which cause floods, the shortage of housing, the lack of resources directed to the growing student population and the miserable state of the hospital system are permanent cause for discontent. The labor conflicts have advanced to the point that the takeover of factories is already a common practice and when workers' demands are not met, they resort to other means of pressure, like hunger strikes carried out in the streets or as in the case of the recent conflict of "Duralita", which resulted in the extreme measure of the take over of the Swiss embassy (see the article in this edition of

INFORPRESS). These changes in the conduct of the country's inhabitants are occurring in an era considered an "economic takeoff" in which rising export prices, returning capital deposited in foreign banks, and a marked increase in public investment all support the modernization of agriculture, the growth of the manufacturing industries and mainly, the expansion of commercial activity. A representative characteristic of this "takeoff" is the constant increase in the price of basic necessities and services at a rate considerably greater than the increase in wages. In most cases, price increases cause only isolated discontent, because there exists the personal option of reducing or eliminating consumption. Transportation, however, is a service of such great importance for urban activities that fare increases occasion many protests and in the last decades all attempts to raise transportation fares have been unsuccessful in Guatemala. Decisions in that respect have caused violent protests which forced the revocation of fare increases.

A. – PEACEFUL PROTEST, REPRESSION AND VIOLENCE. The protests against the fare increases began on February 28 in the freeway known as the "Periphery Ring" when neighbors from the area stopped traffic for 15 minutes. Afterwards, peaceful student protests took place on September 29th when a group of secondary school students gathered in front of the capitol's municipal building, and were then dispersed by the threatened use of force by the National Police. On October 2nd, in the neighborhoods of zone 19 and surrounding areas, neighbors impeded the passing of vehicles and the presence of the "Model Squad" caused confrontations that resulted in beatings by both sides and numerous tear gassed individuals. Soon after, the violent protests spread to other areas

of the capitol and two days later, it was reported that an indeterminate number of protestors were killed or shot, several buses were destroyed, there was material damage to many commercial establishments, a total suspension of transportation services by the urban service companies, reduction of small business operations, cessation of some factory and state agency activity and it was estimated that the country would see a decline in tourism. The activity of protest groups has proved to be more innovative than in the past. Generally, the disturbances are restricted to the center of the city and damage suffered by businesses is indiscriminate; but in this case, the disturbances originated in the surrounding neighborhoods and the destruction of physical assets has affected a considerable number of businesses, though estimates of losses have not yet been precisely calculated. In addition, factory labor unions in the city of Almatitlán, situated 28 kilometers from the capitol, stopped traffic and when subdued by the police, three people suffered gun-shot wounds, which in return, the groups of workers threatened that if any of the wounded protestors died they would stop production entirely.

B. – THE ATTEMPT TO REESTABLISH ORDER. Several divisions of the National Police, which act as antiriot forces, have resorted to violent methods not seen in previous encounters. Government spokespersons continue to insist that the peace officers have not used firearms and that they have express orders from the President of the Republic to disband the protesters using other means. Nevertheless, numerous photographs published by the press and television news film footage show police shooting at groups of civilians. Of all the public protests staged

by students and workers in the last ten years, there has been only one known incident where firearms were used during a protest, in May 1974, that occurred because of the results of the presidential elections that year. During the last decade disturbances in the streets have been sporadic although always characterized by their intensity; including the protest of the teachers movement in April 1973 (see INFORPRESS, No. 38) and July of the same year (see INFORPRESS, No. 50 and 52) as well as the violent actions against urban buses in December and January 1974. The fact that police have resorted to the use of firearms in this most recent protest may have originated in the fact that the means used to dissolve the August 4th protest of this year were not effective. (see INFORPRESS, No. 305). In any case, the rejection of armed repression has provoked widespread repudiation. An editorial in the "Nuevo Diario" on October 4th affirms: "One saw the protest come but without even an attempt to counter it verbally, but instead the intent was to resolve the problem with gunshots and for this, the capitol's citizens today will be burying along with their dead, their respect for authority."

C. – LABOR DEMAND, MUNICIPAL INTERVENTION AND FARE INCREASE. The increase in fares was the culmination of a series of administrative failures to resolve the transportation crisis. On July 13th, workers from the bus companies began a labor stoppage to demand an increase in wages (see INFORPRESS, No. 300). By governmental decree, the municipal government convened a multilateral commission in an attempt to find a solution to the conflict (see INFORPRESS, No. 301). On

August 16th, the Metropolitan Council agreed with the intervention of urban transportation, pursuant to the prior resolution by the Labor Minister, to fix a minimum salary for workers (see INFORPRESS, No. 305). On August 24th, the failure of the municipal measure was publicly recognized, and since that time urban transportation has returned to normal. (see INFORPRESS, No. 306). On September 26th an agreement was signed by the President of the Republic, the Metropolitan Council and representatives of the Association of Urban Bus Companies to raise fares 100% over what they had been before, from Q0.05 to Q0.10. Official commission studies from previous years showed that the transportation crisis originated from ineffective business organization and that fare increases "would cause grave social, political and economic consequences to the system that could force the central government to settle matters by taking drastic and irreparable measures against the existing institutional system." [(see INFORPRESS No. 306)].

APPENDIX B-2

"Violence: Constant and Growing" [*"Violencia: constante y creciente"*] (Inforpress Centroamericana), May 3, 1990

The time period between the 17th and 30th of April established a continued increase in violence that has swept the country and has worsened in the last few months (Inforpress 875, 881, 882). Again, San Marcos

was the main stage for the most violent events, with the highest number of people that were assassinated and with signs of having been tortured, kidnaped, or with bullet wounds. Within this context, the accounts of common violence were also part of the circumstances, characterized by the economic crisis and electoral struggle. During that particular period, a singular event occurred, that being the capture of several police agents who were accused of being "torturers and kidnappers."

San Marcos, Center of Violence. In this context of electoral and guerrilla struggle and the economic crisis, the wave of violence continued severely impacting different sectors of society but especially the campesino population. The violent events, that because of their nature are considered political, were concentrated for the most part in the province of San Marcos, a region that for years has been severely hit by drug trafficking and war.

That department reported 6 of a total of 18 deaths that the press made known, which constitutes 33% of the reported cases, while the department of Quezaltenango was in second with 5 deaths, or 28%, making this department also known for the confrontations between the military and guerrillas that have taken place, especially in the coastal area. Nevertheless, the numbers have tended to diminish insofar as the previous reports that Inforpress has obtained.

These same characteristics also explain why San Marcos was the focus of almost the total number of kidnaping cases that took place in the country. Thus, of the ten kidnapings reported by the written press, 9 of them took place in that department, which represents

90% of the reported cases. It should be mentioned that in the case of San Marcos, in the shorter period of February 19 – April 17, the numbers surpassed the reported figures totaling 8 kidnapings, thus showing the drastic increase in the number of kidnapings throughout the country.

Among the last accounts of violence presented by the press is the assassination of José Maria Ixcayat, the director of the Runujel Junam Ethnic Community Council (CERJ – Consejo de Comunidades Etnicas Runujel Junam), which took place in the district of Pojopil, Sololá, at the moment he was getting ready to travel to the capital to participate in the commemoration of the labor day. Also, there was news of the death of a student from the University of San Carlos of Guatemala (San Marcos section), Victor Heriberto Velásquez Fuentes, after having been kidnaped on April 24; his body was found with several bullet wounds in different parts of his body. To this information one must add the accusations made by the Mutual Support Group (GAM – Grupo de Apoyo Mutuo), that in the first four years of the Christian Democratic government, there have been 4 thousand political assassinations, 1300 kidnapings, and 600 wounded in attempted murders (El Gráfico 2/5/90).

Police Involved In Common Violence. To this political violence one must include the common violence that deepens during economic crisis (and with increased unemployment), and as the presidential election nears. Those factors would demonstrate why the majority of these acts, deaths as well as kidnapings, are concentrated in the capital, most of these acts are being provoked by assaults and attempted robberies, and reflecting the level of dense population of the capital.

In the same manner it is reported in the same time period studied that 29 people were assassinated, equivalent to two people a day of which nine cases occurred in the capital, representing 31% of the total. Nevertheless, common violence extended to departments, such as Jutiapa, where the second-most number of cases, 8 assassinations, occurred (28% of total). In addition, the capital reported 6 of the 8 kidnappings which occurred (75% of total), and 7 of the 17 of the wounded reported. Among the published information stands out the "Diario Siglo XXI" (4/30/90), that stated that between April 28th and 29th there were 60 deaths and 108 wounded. Among those cases was the assassination of two Salvadoreans working in a currency exchange after robbing them of Q100,000.*

The information that stands out the most was the capture of 9 police agents accused of being "torturers and rapists", among them the head of the Office of Professional Responsibility (OPR), (formerly "Internal Affairs"), Commissioner Eli Gonzales, (this office is in charge of monitoring the actions of police agents), who along with another agent is accused of torturing two members of the Seventh Corps of the police. In this respect, information from Geovanni Valerio Cárdenas, the General Director of the Police, indicates that between June of 1989 and April of 1990, more than 150 agents have been fired (including

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* It should be noted that the cases reported here are not complete, since the press does not release many cases that occur daily.

chiefs and subchiefs) equivalent to 15 per month, for external and internal criminal acts.

APPENDIX B-3

"Congress Will Not Support Fare Increase", ["*El Congreso no apoyará aumento a los pasajes*"], Siglo Veintiuno, May 13, 1990

The Congress of the Republic has taken a stand against the new proposed fare increase for urban transportation, rejecting the position advocated by the Association of Urban Transportation Companies, as well as the pressure and blackmail they exercisē to achieve their goals. Representative Rafael Arriaga Martínez, President of the Congressional Committee of Communication, Transportation and Public Works, stated that the legislative body will not back the transportation providers who have formally solicited support from the representatives for a 100% fare increase.

In Congress, Arriaga stated, we oppose a new increase in urban fares because it is not justifiable and because we will have to approve an extension of the subsidy for six more months. Therefore, he emphasized, it is not acceptable for the transportation providers to attempt to raise fares to 40 cents.

Inflated Costs

Although urban transportation providers have presented the Congress and the Municipality with an

estimate of the increases in their operational costs, which resulted from the economic crisis, the Chairman of the Communications Committee pointed out that a new fare increase on urban transportation is not justifiable. Rafael Arriaga stated in his estimate that the transportation providers contend that they acquire fuel at the same price as common citizens, when in reality, they acquire it at a preferential price of 2.76 quetzales. Aside from that, they claim that they must buy new sets of tires every three months, when it is known that they purchase new tires no more than every nine months, because they retread all tires twice before getting new ones. Arriaga stated that, in this way, transportation providers are inflating their costs to justify their claims when they continue to make large monthly profits despite the economic crisis.

APPENDIX B-4

"Alfonso Alonso: Posture of Transportation Providers Inconsistent with the Public" [*"Postura de transportistas inconsecuente con el pueblo"*] Prensa Libre, May 14, 1990

"The posture of the urban transportation service providers is inconsistent with the most economically needy classes" said representative Alfonso Alonso, Christian Democrat of the René de León Schlotter wing, when commenting on the petition of the representatives of that service, as they negotiate the authorization to increase the

transportation fare to 40 centavos. He said that the transportation providers not only raised fares by 100% but that they have enjoyed government subsidies as well, and still there is no guarantee that the population can count on better service.

"It's impossible that the popular sector could pay such a huge increase; this will come to brutally aggravate the extreme poverty of the people", he said lastly.

APPENDIX B-5

Guatemalan Ministry of the Interior, [Ministerio de Gobernación], Accord No. 66-90, *Diario de Centro America*, No. 82 May 21, 1990.

THE MINISTRY OF THE INTERIOR

It is hereby declared that the collective ground transportation system of people and cargo across the entire national territory is essential for the community and as a consequence the provision of such services cannot be suspended.

GOVERNMENT AGREEMENT NUMBER 466-90

National Palace, Guatemala, May 21, 1990.

THE PRESIDENT OF THE REPUBLIC

CONSIDERING:

That some of the urban collective transportation owners, in adopting certain measures, paralyzed public

transportation services, seriously prejudicing state security, the public order, the national economy and the citizens' freedom to travel;

CONSIDERING:

That in accordance with the Political Constitution of the Republic of Guatemala, the state is obligated to guarantee liberty, security and peace to the inhabitants of the Republic. And so that this obligation may be met, it is necessary for the state to adopt appropriate measures in order to reinstate the essential public services for the community;

CONSIDERING:

That the Political Constitution of the Republic of Guatemala grants the State broad authority, in cases of overriding crisis and strictly for the period necessary, to take control of companies that provide essential public services when their operations are interrupted;

THEREFORE:

In the exercise of the authority conferred by section (e) of article 183, of the Political Constitution of the Republic of Guatemala, based on Articles 2 and 120 of the Political Constitution of the Republic of Guatemala,

Under Ministerial Consultation
IT IS HEREBY AGREED:

ARTICLE 1. For compelling reasons, it is declared that the collective ground transportation of people and of cargo across the entire national territory is a public service essential to the community and that it cannot be suspended.

ARTICLE 2. To take control of companies who deliver the service of collective public transportation of people and cargo across the entire national territory who have suspended or intend to suspend said services.

ARTICLE 3. In order to make effective the measure stated in the previous article, the municipalities of the nation as provided in the Municipal Code, shall take control of these companies and such take over will be communicated to the Minister of the Interior, in coordination with the Ministry of Communication, Transportation and Public Works and from that time the authorities that have effected the take overs shall act under direct orders from The Minister of the Interior.

ARTICLE 4. The Minister of the Interior is expressly authorized to do the following:

a). He shall use the public force to facilitate and maintain the renewal and continuation of service, public order, the citizens' right to travel freely, and to assure the protection of the integrity, the people and their property.

b). He may employ all personnel that may be necessary in order to make the intended take overs effective.

c). He may direct all workshops of the State to undertake the review and repair of all transportation units that, for whatever reason, are not being utilized.

d). To finance costs resulting from the take overs, with the profits of the enterprises that have been taken over and should that not be sufficient the Minister of Public Finance and the pertinent Municipality are authorized to make

any legal adjustments as may be appropriate to make any payments necessary by billing Urban Transportation's Subsidiary funds and to establish an extraordinary fund specifically for that purpose.

ARTICLE 5. The Comptroller General in charge of accounts should undertake audits of the companies that have been taken over in order to determine the correct amount, application and necessity of the subsidies that they have received from the state and equivalent – actions will be undertaken by the Director of Fiscal Inspections of the Ministry of Public Finances.

ARTICLE 6. The municipalities, in coordination with the Public Ministry, will initiate civil actions and penalties which correspond to the suspension of collective land transport services of people and cargo.

ARTICLE 7. In order to facilitate this agreement the Civil and Military authorities will lend all cooperation necessary to the Minister of the Interior.

ARTICLE 8. The take overs undertaken pursuant to this ministerial agreement will cease the moment that the transportation companies normalize services.

ARTICLE 9. This agreement will take effect immediately and will be published in the *Diario Oficial*.

MARCO VINICIO CEREZO AREVALO

Licenciado ROBERTO CARPIO NICOLLE,
Vicepresidente de la República

SIGFRIDO MENDIZABAL G,
Ministro de Comunicaciones, Transporte
y Obras Públicas.

Dr. CARLOS GEHLERT MATA,
Ministro de Salud Pública y Asistencia Social,

General de Brigada
JUAN LEONEL BOLAÑOS CHAVEZ,
Ministerio de la Defensa Nacional,

Ing. Agr. CARLOS DE LEON PRERA,
Ministro de Agricultura, Ganadería y Alimentación

CARLOS RENE ESCOBAR MONTENEGRO,
Ministro de Educación.

Lic. CARLOS AUGUSTO MORALES VILLATORO,
Ministro de Gobernación.

MARIO ALVEREZ GILL,
Encargado del Despacho.

Dr. CARLOS ENRIQUE SOTO M.
Ministro de Asuntos Específicos.

Lic. JOSE RODOLFO MALDONADO RUIZ,
Ministro de Trabajo y Provisión Social.

Lic. ANTONIO PALLARES BUONAFINA,
Viceministro de Relacíones Exteriores
Encargado del Despacho.

MARTA REGINA DE FAHSEN,
Viceministra de Cultura y Deportes,
Encargada del Despacho.

Lic. OSCAR HUMBERTO PINEDA ROBLES,
Ministro de Economía

JUAN FRANCISCO PINTO C.
Ministro de Finanzas Públicas.

Ing. RAUL EDUARDO CASTAÑEDA ILLESCAS,
Ministro de Energía y Minas

APPENDIX B-6

"Teachers Support Students in Their 'Just' Demands" [*"El magisterio apoya a los alumnos en sus 'justas' demandas"*], La Hora, June 4, 1990, at 5

Teachers unconditionally support the students in their just demands that transportation providers accept the School Voucher and insists that they respect the law, since the voucher is regulated by the Legislative Decree 8-90, which was reported today to LA HORA by Raul Montenegro of the Advisory Board of the National Association of Secondary Education. [ANEEM]

"The consequences of the student's discontent cannot be foreseen, possibly leading to disturbances and a serious social conflict, all because of the whims of the transportation providers in not accepting the voucher," he said.

"Clearly this voucher specifies its validity as bus fare, that is 20 cents, making illegal the attempt to charge students 10 cents more for each ticket," he indicated.

THE NORMAL COURSE OF THE SCHOOL YEAR WILL BE AFFECTED

"This problem will affect the course of the normal school year," Montenegro added, "having negative consequences on the planned course work of each subject. Already today the classes were suspended after the students left school to participate in a peaceful march of protest." They will be missing out on their education, especially as the mid-year exams approach, however it is

not their fault, but the caprice of the transportation providers," he added.

ANEEM ANALYZES THE PROBLEM

"ANEEM is analyzing the School Voucher problem, observing it with great concern and awaiting the intervention of the authorities in favor of the students' interests," Montenegro said. "Once again," he added, "the transportation providers are creating problems, but not for the government, but rather in this case, for the students, all from the social classes most in need, who are always the most affected."

APPENDIX B-7

"Education Ministry Blames Transportation Providers" [*"Ministerio de Educación culpa a los autobuseros"*], *Siglo Veintiuno*, June 5, 1990, at 12

Julio Batres, the Viceminister of Education, criticized urban transportation providers, holding them responsible for obstructing the school year when they rejected the student school vouchers for urban transportation. "The transportation providers are acting with resentment in an immature way and all indications are that they are not looking for anyone to whom they are obligated but for someone to pay them", said the public official, demanding a rapid solution to the conflict that began after the rejection of the school vouchers.

He said that the Education Ministry has followed through with all requirements in order to avoid problems with secondary school students, but the transportation problem is beyond the power of this branch, thus requiring the cooperation of the owners of collective transportation.

When asked about the possibilities of the paralyzing of the school year, Viceminister Batres called upon the sensibility of the students and teachers to not let themselves be taken advantage of by interested parties that only want to capitalize on the student movement for the purpose of creating a climate of instability.

"I believe the students have acted maturely and are right to protest the lack of service that is guaranteed to them by the government through school subsidies. Now the question is whether the transportation providers will respect the legal dispositions in order to avoid greater conflicts," he emphasized.

Batres continued saying, "Teachers are able to develop a study program by means of homework assignments in order for students to take full advantage of their time and achieve greater progress. I regret the time loss in the teaching-learning process, first due to the transportation work stoppage for two weeks, and now because of the refusal to accept the student fare vouchers, and in addition, the shortening of the school year due to elections, which will advance the end of classes."

APPENDIX B-8

"Political Violence Provokes Agitation" [*"Violencia política provoca agitación"*] (Inforpress Centroamericana), June 14, 1990

Constant violence in the country has continued during the last months, with the tendency to increase in June (Inforpress 883). Among the many cases, the ones that stand out are the actions committed against organized sectors of human rights organizations and displacees, which have caused international protests and actions to that effect. In the midst of one of these protests, like the taking over of an International Red Cross Center, the Mutual Support Group (GAM) renewed the demand for the President of the Republic to follow through on his numerous offers to create an Investigation Commission, which he has never complied with.

Cases of violence in May and June. Over the past few days, violence has increased noticeably; 15 assassinations have been reported in the first four days of the month. Standing out among these acts are the appearance of victims in places near the capital that have traditionally been used to dispose of cadavers. In Villa Canales, Mixco and Amatitlán there have appeared in this time period seven cadavers, in some cases with evidence of torture, with their hands tied and shot or wounded with a knife.

Another case that occurred in the capital was the assassination of Otto Salvador Hernández, who was getting ready to leave the country after having received death threats.

In the meantime, it become known that two patrollers and a military commissioner who were responsible for the assassination of Maria Mejiá, Director of the Council of Ethnic Communities "Runujel Junam" (CERJ, Consejo de Comunidades Etnicas, Runujel Junam) were released in Santa Cruz del Quiché. The above mentioned were arrested after Mejiá's husband, who witnessed the assassination, filed accusations. Nevertheless, the judiciary ruled that there was not sufficient evidence to prosecute the accused perpetrators.

Another act of violence that occurred on the first of this month was the machine-gunning at the middle school institute, Rafael Aqueche, by alleged private police, who took such action during the time of a student protest because of problems caused by the urban city transport service.

In the month of May, 45 assassinations and two kidnapings, were registered. The majority of these acts were in Guatemala (14 cases), Sololá, San Marcos and Jutiapa (6 cases in each). Also in this month, six cadavers appeared, with evidence of violence, in a land fill, a "traditional dumping grounds", near the capital.

In the same manner was found on May 1 the body of university student Victor Heriberto Velásquez, who had been kidnaped a week before. In the neighborhood of Pojopil, Sololá, a director of CERJ was assassinated on May 1 by armed men who broke into his house in the early morning hours.

At the end of May, a union representative from the company Tipic, S.A, Filiberto Ramírez, took refuge in the

Guatemalan Red Cross Center with his family after armed men tried to kidnap him from inside his home.

Political violence is also surfacing in the electoral scene. Since the first week of May, Luis Angel López Salguero, the Secretary of Organization of the party branch of the National Center Union (UCN, Union del Centro Nacional), of Jutiapa, is disappeared. Likewise, in San Andrés Itzapa, Chimaltenango, four members of this same party were wounded by a grenade that was hurled at them by unidentified persons. Among the attacked, according to directors of the UCN, were various survivors of the El Aguacate massacre of November of last year.

Violence provokes protests and demands. The event that caused the most repercussions was the kidnaping of Luis Miguel Solís Pajarito, the member of the Guatemalan National Board of Dismissed Workers (CONDEG, Consejo Nacional de Desplazados de Guatemala), who participated in the National Negotiations as a representative of the refugees. Solís, whose father and brothers were also missing, was threatened at the end of April, and on May 3, he was kidnaped in the Capital. After the act, CONDEG demanded that the President of the National Reconciliation Comission (CNR) intercede for the appearance of Solís before responsible entities, since as of May 27, there had never been a protest by the CNR.

At the end of May, CONDEG released a report stating that on the 23rd of that month, the patrollers Salvador Tiño, Enrique Chich and two other persons tried to kidnap a director of CONDEG in Santa Cruz del Quiché.

The most impressive event that resulted from the kidnaping of Solis was the take over of the headquarters of the International Red Cross Center from May 29 to June 1, by the Mutual Support Group (GAM). The occupants demanded the live appearance of various missing persons, among them Solís Pajarito and Rumualda Camey, (kidnaped the previous year) as well as the creation of the Investigating Commission, which the present government has been promising since 1985.

It is important to remember that after constant pressure by GAM, the commission was agreed upon but it never came to life. According to Claudia Arenas, the presidential spokeswomen, this was due to the fact that the previous Human Rights Ombudsman, Gonzalo Menéndez de la Riva, refused to participate in the Commission. Afterwards, the government promised to reactivate the commission in March 1988, when it signed the agreements with the Organization of Labor Union and Popular Action (UASP, Unidad de Acción Sindical y Popular), but once again this promise was not met.

GAM abandoned their premises with a letter in hand from the Vice-President of the Republic, Roberto Carpio, in which he committed to respond to their demands. In the first meetings with the official, that still have not concluded, it became known that the Human Rights Ombudsman Ramiro de León Carpio refused to participate in the commission, because the members of GAM announced that they would agree to keep the commission together only if the commission was comprised solely of Executive representatives.

Together with these events, international signs of solidarity with the sectors affected by violence continued to be manifested. In early May, representatives of the Organization of Continental Latin American Students (OCLAE, Organización Continental Latinoamericana de Estudiantes) and the Interamerican Student Union (UIE, Unión Interamericana de Estudiantes) visited the country with the purpose of investigating the reports of harassments against the student sector. The UIE and the University Student Association (AEU, Asociación de Estudiantes Universitarios), will try to establish in Guatemala a group of observers of student and academic rights, whose seat will be in Guatemala.

For their part, Canadian students asked their government to suspend aid to the Guatemalan regime until it investigates the kidnaping and assassination of university students.

Finally, the Interamerican Commission on Human Rights of the Organization of American Students (CIDH, Comisión Interamericana de Derechos Humanos de la Organización de Estados Americanos), released a report in which they affirmed the existence of organizations of hired assassins that provide their service to politicians and that are protected by an impenetrable shield of anonymous impunity. The report adds that presently in Guatemala violence is increasing drastically, and that the government's reputation is tarnished due to the inadequate system of justice.

APPENDIX B-9

"Transportation Users Protest the Increase in Night Fares" [*"Usuarios protestan por alza de pasaje nocturno"*], *La Hora*, July 18, 1991

Public urges fare standardization, since many microbuses charge as much as Q1.50 per trip.

Patrons of urban transport, who are unhappy at continual increases in fares for night service, renewed their protests this morning. Residents of zones 7, 11, 12, 18 and 19 of the capital have indicated an urgent need for municipal regulation of night time bus fares as soon as possible, because otherwise the transportation companies will continue to increase the fares to serve their own whims, prejudicing the interests of the residents.

According to these affected, the biggest problem comes from the microbuses whose fares between 8 and 9 at night oscillate between Q1.25 and Q1.50 per trip – a price which they find inconceivable – thus they are at the mercy of the transportation providers who take advantage of the public's need for access to transportation in order to get home at night.

Such fares would be justified if the service were efficient but it is exactly the opposite. The day time service leaves much to be desired and the nighttime journeys are essentially a cross to bear ("un calvario") that the passengers have to endure.

The problem also exists among bus companies, which have at least taken the care to post visible fliers on the buses that warn the public about the 100% increase in

night-time fares, but the problem is more prominent in microbus companies.

Such fare is now a tolerable 80 cents, which when all is said and done, they indicated is tolerable, given no legal regulation of fares. In contrast, to pay as much as Q1.50 for a night-time fare on a microbus, which arrives only once every hour or hour and a half, with passengers obliged to ride with only the minimum of security precautions, thereby endangering their lives, is intolerable, the residents pointed out.

As a consequence, those affected are demanding municipal regulation of nocturnal service of the buses and especially the microbuses that provide urban transportation.

It is not fair that transportation providers try to take advantage of consumers' need to depend on the night service by charging high fees according to their whim in order to raise their profits while seriously hurting the public, they indicated.

Just as there is regulation for day time fares there should be, and without delay, for night time fares, which has a higher demand, said the complainants.

Otherwise, consumers will suffer increased econo[illegible] harm as a result of paying almost 400% more for bus fares, they concluded.

APPENDIX B-10

"No Fixed Increase for Urban Transport" [*"Sin fijar alza en pasaje urbano"*], *Prensa Libre*, December 7, 1992

New Fares to Take Effect the 16th of This Month

Nine days until the termination of subsidization for urban transportation, the Guatemala City Municipality and representatives of the Urban Transport Coordinator have been unable to reach an agreement as to a new fare increase, it was reported.

The round of talks intended to fix the amount of the increase have been going on for months and have now stalled completely due to each side arguing that there are different reasons for them to not compromise and accept the other's position.

Mayor Oscar Berger Perdomo has maintained the position that he will not authorize new fares because the increase sought by the transportation providers is far too high, and has made it known that he hopes the commission appointed by the Executive will favor the municipal corporation's proposal.

The local government asked the government to invest in urban transportation, so that they can authorize new fares, and as a separate matter, asked for the completion of the second phase of the freeway which runs peripherally around the city, the construction of separate lanes for buses, the change in starting times in the work place and voucher to workers in the public and private sectors.

- **The Voucher is Rejected**

After analyzing the municipal proposal, the commission authorized the graduation of starting times only, but rejected the idea of the voucher. With regards to the latter, Berger has said that the Minister of Public Finance, Richard Aitkenhead Castillo, has indicated that the resources don't exist to grant said voucher which is why the proposed salary increase was also rejected.

- **New Fares**

The local government maintains its position with regard to three possible prices; Q0.50, Q0.60, and Q1.00 while the bus owners continue to ask that fares be raised to Q0.80 and Q1.25.

Gamaliel Chin of the Office of the Coordinator has declared that starting the 16th of December, the fares will have to increase, which they have placed announcements in the buses about, explaining the increase to the public as due to bus companies no longer affording to operate at a loss since the supplies and parts they use are imported and they acquire them at high prices.

- **The Church Rejects It**

The archbishop Próspero Panados de Barrio rejected the fare increase for urban services and said that the municipal authorities need to understand the severe poverty that exists in the country, a situation that may upset the public more.

APPENDIX B-11

"Two New Rates Are Fixed for Urban Transport" [*"Fijan dos tarifas para el transporte urbano"*], La Hora, December 10, 1992

*Fares are set at 60 and 85 for normal service and preferred service, respectively.

The Municipal Corporation of Guatemala resolved to definitively fix two rates for the urban transportation service of the City of Guatemala after a careful study of the companies' financial state.

The new fares are set at 60 centavos for regular service and 85 centavos for preferential bus service: both increases are substantial enough to guarantee adequate financial earnings for transportation providers.

The study done by the Council determined that with a rate of 60 centavos transportation providers will be able to earn a net profit of 22%, thus any attempt to raise rates any higher would be improvident.

The Municipal Corporation submitted the study for consideration at last night's session after determining definitively that fares should not be raised any higher than those mentioned, which should protect the interests of the public.

In addition said fares grant a sufficient margin of gain for transportation providers, thereby automatically guaranteeing they will have to provide their services.

This means that the rate for regular service would go up from 40 to 60 centavos for each fare, in other words,

an increase of 20 centavos, and the preferential from 75 to 80 centavos, or five centavos difference.

Earlier municipal studies have concluded that in order for urban transport to maintain a profit, fares could not be lower than 55 centavos and no higher than 80 centavos.

These studies have since been subject to a number of later analyses throughout this year in which the final decision of the acceptable bus fare was finally ready according to which two fares were established and clearly defined which cannot be exceeded by the transportation providers.

The municipal resolution is adopted a week before transportation providers began charging increased fares, claiming an increase in operational costs, as they have announced on flyers placed inside buses.

Discontent has been manifest even as they are unaware of the rate to be fixed for fares. But the resolution of the Municipal Council is determinative with respect thereto, as it is based on financial studies of the state of the urban transportation system in Guatemala City.

However, transportation providers have unofficially let it be known that the rates they have proposed are 80 centavos per fare for regular service and one quetzal and ten centavos for preferred service.

APPENDIX B-12

"Transportation Crisis and the Passengers' Cross to Bear" [*"Crisis del transporte y el calvario de los usuarios"*], *La Hora*, December 12, 1991

* This grave problem goes back years.

The current urban transportation crisis in Guatemala City is a dramatic inheritance from the unfortunate history of the service that has greatly impacted the thousands of people that need the service every day.

The roots of this crisis go back almost 20 years, resulting from the deterioration of this service which is the direct fault of transportation providers who have never made good on the promise to improve it and instead have provided the public with a service becoming increasingly deficient and unsatisfactory.

The first recent crisis came in December of 1973 when urban transport, skillfully manipulated by political tendencies, in light of the proximity of the presidential elections the following year, decided to create problems for the municipal administration of the lawyer Manuel Colom Argueta.

Demanding an increase in fares, transportation providers stopped service a few days before Christmas, taking advantage of the high demand for transportation common during this season.

However, the mayor took over the companies and named as intervenors ex-military officers, succeeding in reestablishing service almost immediately.

Two new work stoppages occurred during the following municipal administration led by the lawyer Leonel Ponciano León from 1974-1978: always a result of pressure from transportation providers who were not content with the fact that fares had remained at 5 centavos.

During the administration of lawyer and colonel Abundio Maldonado, the pressure applied by transportation providers motivated intervention by general Romeo Lucas García, due to grave disturbances, but despite everything they succeeded in getting bus fares raised to 10 centavos, at the cost of numerous injuries to mostly innocent victims.

Always exerting pressure based on their eternal discontent, transportation providers managed to gain two almost consecutive fare increases during the municipal government of Alvaro Arzú. The fares rose from 10 to 20 centavos and finally from 20 to 40 centavos.

Now they are seeking an increase of 100% – from 40 to 80 centavos for the so-called "regular" service "and an increase from 80 centavos to Q1.10 for "preferential service", including the metrobus, which is incorporated with the Urban Transport Coordinator.

Transportation providers exert constant pressure, arguing losses in a business which provides an excellent yield. In fact, business is so profitable that in the decade of the 70's urban transport permitted itself the luxury of selling to El Salvador more than half of the diesel that the government provided to them subsidized; before the approval of the monetary subsidy of millions which is currently at Q72,000,000 per year.

APPENDIX B-13

"Bus Companies Impose New Fares According to Whim" [*"Transportistas imponen tarifas antojadizas"*], *La Hora*, December 17, 1992

* Normal service in spite of work stoppage in the capitol

In Quezaltenango City urban transportation companies have not stopped service, nevertheless they have increased the 25 centavo rate to 35 centavos, although they still count on a subsidy, the representative for the western department, lawyer Luis López Maldonado announced this morning.

Congressman Luis López Maldonado, who is also the first Vice President of the Republic's Congress, indicated that presently the Mayor of that province, Roberto Pérez Maldonado, at the moment has not adopted any measure to prevent the urban transport providers from arbitrarily and illegally raising fares.

López Maldonado recalled that during his time as mayor in Quezaltenango which is the second most important city in Guatemala, when the city was faced with a similar problem, namely the paralysis that in these moments is being lived by the metropolitans, they immediately dealt with it by imposing fines and terminating concessions.

However, the current Municipal Chief continues to not take action, although the situation in Quetzaltenango is less complicated than at the capitol in that the number of transportation companies numbers only 100, stated

Pérez Maldonado, meaning that the municipal government has much more control over the transportation companies and their subsequent fares, so that the mayor Robert Pérez Maldonado should put an end to the situation.

"In Quezaltenango City the urban transportation companies have increased fares in an arbitrary and illegal manner in spite of the subsidization they receive. However the anomalies do not stop there – the drivers who handle these units do not extend the respective ticket and are calmly charging 35 centavos," explained López Maldonado.

The Congressman of the Christian Democratic Congress of Guatemala (DCG) concluded that, according to his sources, urban transport is providing normal service; nevertheless, in the face of a probable work stoppage, that will undoubtedly be illegal, adding to the arbitrary fare increase already mentioned, the local government should act quickly and with force.

APPENDIX B-14

Edgar Aragón, "Economic Indicators of the Urban Transportation Crisis" ["*Incidencia economica de la crisis del transporte urbano*"] La Hora, December 17, 1992

The urban transport crisis has had an economic effect on the entire population to the

extent that public transport is needed by approximately two and a half million people everyday. The economic impact of this service can be easily quantified by its cost to the users and their rejection of a service that does not satisfy transportation demands.

Dissatisfaction with Demands

The inability of the urban transportation system to meet the needs of customers who live in Guatemala City is a painful problem of the recent crisis. The number of buses in circulation does not adequately meet the public's daily transportation needs to go to their jobs every day.

According to statistics from the Municipality of Guatemala there are between 29 and 32 companies that operate approximately 1,370 average vehicles of transportation in the capital city every day.

Of these companies 16 are bus companies who operate an estimated 1,270 vehicles to provide transportation to about 1,500,000 users each day.

There are 13 microbus companies, also known as cruising taxis, that according to municipal estimates provide transportation for about 1,500,000 people every day.

The demand for such methods of transport has reached a saturation point. According to the city hall, in 1990 the population of the metropolitan area was determined to be 1,825,834 which is the estimate of the Association For the Well Being of the Family (APROFAM). According to City Hall, the population has increased to 2,074,562 Guatamalans in the past two years.

Such statistics highlight the fact that the transportation system is clearly insufficient to meet the needs of the inhabitants, and on the contrary, results in a deficit since the number of users exceeds the total number of inhabitants in the metropolitan area.

However, it must be noted that many of the people who use the public transportation system make more than a single trip each day, thus logically resulting in the number of users exceeding the population.

Redirection of subsidy

The thorny nature of the price of urban transportation in relation to the elimination of the state subsidy has revitalized the issue of rechanneling of the subsidy, a matter that has remained pending, as a practical matter, for more than half a year.

The rechanneling is contemplated by the Decree 29-92 of the Congress of the Republic on April 28th of this year, which provided that the Executive branch, represented by the Minister of Public Finance, should have programmed in the Income and Expense Budget for 1993, Q72,000,000 to be channelled through the Capital Municipality to urban transport provided in the following terms:

The transportation system must designate Q20,000,000 for bus passes for employees of the Executive, Legislative and Judicial Bodies, for 25 quetzales per month for each worker, and for municipal employees whose monthly salaries are less than Q800.

This was intended to directly subsidize the workers and allow them to face, albeit barely, the monthly cost of transportation.

The Congress has also allocated an additional Q25,000,000 to the Capital Municipality to invest in the termination of the construction work of the "Peripheral Ring" in Guatemala City and the construction of alternative routes intended to alleviate the tremendous amount of vehicular traffic.

As an additional measure of rechanneling the subsidy is intended to counteract the economic impact of the demand for public transportation, particularly at peak hours.

Behind the Trusteeship

Another intention of the rechanneling of the subsidy was the support of trusteeships who will be offering credit, to various urban transportation companies, for Q17,000,000.

Supposedly this is being allocated for such trusteeships and is expected to provide enough credit to companies that they will be able to acquire new buses, repair old ones, improve the overall maintenance of those still in circulation and generally improve the deficiencies in the services.

The Municipality maintains that they could acquire 400 new buses exempt from taxes, importation fees, etc.

The Level of Costs

The level of costs for the services rendered is also an important consideration with respect to urban transport problems. Certainly, the price of maintaining the buses, including repairs and spare parts, has increased, but subsidization has financed at least part if not all of the cost of the service.

Meanwhile, the bus companies maintain that the subsidy is not working in their favor in that when it commenced it was equivalent to 9.7 centavos for each bus ticket sold, but due to the devaluation of the Quetzal its value has been reduced to 6.9 centavos, causing bus companies to operate at a loss.

For their part, the Labor Union of Drivers of Motorized Vehicles (SPAS) insists that earnings are important and will not occur without subsidy and a higher fare.

For each service unit charging 80 centavos per trip, the transportation providers would obtain a daily net earning of Q161,879.35 and 80,879.35 if they charge 55 centavos per trip.

According to the Bank of Guatemala, however, this past June urban transport companies had purchased a total of 213 millions of tickets.

Local analysts estimate that this data from the central bank, which was obtained in turn from the Municipality of Guatemala, is a short term economic indicator that demonstrates the profitability of the service.

Effects of the New Fares

The economic problem of urban transportation affects the cost of obtaining essential services because it increases the difficulties in satisfying minimum subsistence necessities. The Department of Economic Statistics of the Bank of Guatemala reports that on December 4, 1992, inflation was at 13.32% and that the total index of prices for the consumer was at 519.9, from a base of 100, much higher than the figures for December 4, 1991 which saw a total index of 458.8 (11.66% inflation rate).

The implication of such statistics suggests that the inflation rate will continue to rise until the end of the year. Meanwhile wages will stay as they are and will be unable to keep pace with prices for food and services.

The Institute for Social and Economic Study at the University of San Carlos (IIES), citing statistics from the National Institute of Statistics (INE), shows that until 1990 the minimum daily cost of feeding the average family of five was Q12.65 with a monthly total of Q379.38. These numbers refer to a basic nourishment, and do not take into account basic services like health care, housing, clothing or transportation.

The minimum amount of money required to sustain a family of five for a single day was Q25.16 with a monthly cost of Q754.80. In the past two years however, those figures have tripled while wages remain at levels that are insufficient to cover the basic needs of a family.

The IIES states that forecasts of economic activity show the average salary is currently at Q11.60 a day and Q500 a month.

The increase in fares for urban transportation will have a negative impact on families who use public transportation. Studies show that a family of five will spend a minimum average of Q150 each month on public transportation alone.

If one takes into account the costs of daily living and the average wage for workers based on the above statistics one will conclude it will be difficult for most of the 2.5 million users to confront the increased fare.

According to the National Center for Economic Study (CIEN), the subsidization of the transportation systems has until now, kept the price of bus tickets as low as possible by providing Q6,300,000 in aid every month or the equivalent of Q72,000,000 each year. Ninety-five percent of the subsidy was allocated to the nation's capital and five percent went to the rest of the country.

The CIEN and other entities are in favor of eliminating the subsidy and deregulating fares with the idea that it will be an incentive for new transportation companies to participate and thereby broaden the existing system, increasing competition, stimulate efficiency and to improve the quality and diversity of service.

Thus, the task is to reconcile interests, on the one hand taking into account the limited economic capacity of the public to pay higher fares, and on the other the transportation sector must assume responsibility to effectively improve its services, guaranteeing that they will be rendered adequately without mishap now that a great part of the country's economic activity largely depends on its transportation system to mobilize daily an elevated percentage of the economically active population.

APPENDIX C-1

"Guatemala – Human Rights and Security," *Central America Report* (Inforpress Centroamericana, Guatemala City, Guat.), Vol. XV, No. 34, September 2, 1988, at 269-270

Guatemala

Human rights and security

United Nations human rights expert Héctor Gross Spiel notes "enormous progress" in the government's efforts to improve human rights conditions. Within the country, however, charges of rights violations are on the rise.

Human Rights: For International Consumption Only? The Christian Democratic government of Vinicio Cerezo has undertaken a vigorous campaign over the last two-and-a-half years to improve the country's image within international forums. Diplomatic efforts by government delegations contributed to Guatemala's removal from the UN's list of serious offenders in 1987 (*CAR* XIV 14). The mandate of UN rappateur Lord Colville was terminated, and since then UN specialists have made periodic visits to the country to monitor conditions.

During a brief stay earlier this month, Gross Spiel stated that Guatemala has "come a long way" in terms of human rights protection and that rights violations are no longer official policy. He said he had visited refugee resettlement areas in Huehuetenango and El Quiché and was impressed by the work of the Guatemalan repatriation commission (CEAR).

In an interview published by the Salvadoran daily *El Mundo*, however, Gross Spiel affirmed that "kidnappings, torture and extrajudicial killings continue" in Guatemala.

A similar assessment was released recently by the Guatemala-based Center for the Investigation, Study and Promotion of Human Rights (CIEPRODH).* In a strongly-worded report, CIEPRODH claims that the "climate of institutionalized violence and insecurity" in Guatemala accentuated markedly between April and June, with threats, harassment and assassination attempts directed at "leaders of popular organizations." The CIEPRODH report states that military control over the country persists and that forced recruitment into civil defense patrols (*CAR* XV 33) inhibits the population's freedom of movement.

CIEPRODH goes on to charge that "in the name of national security, counterinsurgency and low-intensity warfare, human rights violations in Guatemala are escalating." For the first six months of 1988, the center documented 803 cases, of which half were killings. The violence is tabulated by region: the central region (departments of Guatemala, Chimaltenango, Sacatepéquez and El Progreso), with 39% of the cases (95% of those in Guatemala); the northern region (El Quiché, Alta Verapaz, Baja Verapaz, Izabal and Petén), with 24%, particularly in El Quiché; the southern region (Santa Rosa and Escuintla), with 12%, the western region (San Marcos, Huehuetenango, Retalhuleu and Suchitepéquez), with 15%; and the eastern region (Zacapa, Chiquimula,

* CIEPRODH is directed by Factor Méndez, a former law professor at the national university who spent several years in exile. Earlier this year the center held a forum on human rights in Santa Cruz del Quiché.

Jutiapa and Jalapa), with 9%. Nearly one-third of the cases involve students, according to CIEPRODH.

Violence on the Upswing. Local press reports over the past two months indicate a steady rise in the level of violence.** Incidents follow the familiar patterns: on August 16 in the municipality of Mixco, near the capital, the bodies of two Indian women were found with signs of torture. The two, Martha de León and Victoria Girón, had disappeared on July 18. According to the Guatemalan daily *La Hora* (August 19) the two women had previously gone to judicial authorities in Mixco to denounce death threats received by Martha de León, a native of El Quiché.

Family members of mechanic Walter Domingo Samayoa charged that he was kidnapped from his home by several armed men driving a vehicle with polarized windows. And three brothers, Luis Arturo, Julio Rodolfo and César Amílcar Arroyo Donis, and a friend, César Barrientos, were murdered in the capital on August 17. Witnesses stated the four were abducted by uniformed police, one of whom wore a badge marked "805." National Police spokesman Carlos Chen denied police involvement in the murders, claiming that the badge allegedly worn by one of the abductors had been "lost" over a year ago. Chen added that the Arroyo brothers were fugitives from justice, after the recent discovery of an arms cache in their houses.

** In an upcoming issue *CAR* will publish tally of political violence for the last trimester.

Chichicastenango continues to be a focus of human rights denunciations. Violence and threats there have intensified since residents revealed the location of "clandestine" cemeteries used to bury the victims of massacres in the early 1980s (*CAR* XV 9). The Committee for Campesino Unity (CUC) and the Mutual Support Group (GAM) each recently released statements charging that the Catholic priest in Chichicastenango, Father Ventura Lux Herrera, was expelled by the army. The statements claim that the military commander in Santa Cruz del Quiché ordered local residents to participate in a demonstration against the priest, with the presence of the civil patrol and soldiers dressed as civilians. The priest was accused of being a "communist and guerrilla collaborator" and had received death threats in the past (*CAR* XV 21).

More Vigilance, Less Security. On August 8, the same day the Guatemalan Labor and Popular Action Unity (UASP) initiated a partially successful general strike, the government implemented its new security system, the Civil Protection System (SIPROCI). SIPROCI is to be coordinated by all security forces, including the Mobile Military Police (under the direction of the Ministry of Defense), the National Police and the Treasury Police (under the jurisdiction of the Interior Ministry), and the civil patrols (directed by the army).*** On August 8,

*** An apparent goal of SIPROCI is to avoid further intenecine battles within the security forces, such as that which occurred between ex-National Police chief Colonel Julio Caballeros and ex-Treasury Police director Oscar Díaz Urquizu over the death van case.

security forces were installed in strategic public buildings such as the Post Office, Immigration and Congress.

International human rights organizations continue to insist, however, that so long as the perpetrators of rights violations go unpunished, increased police aid, modernization and coordination will not generate an improved atmosphere of security for the population. Thus, with Interior Minister Roberto Valle Valdizán's recent suspension of the case of the "death van," linking 27 Treasury Police agents to kidnappings and killings earlier this year, Guatemalans have little reason to feel more secure.

APPENDIX C-2

"Students Threatened by New Death Squad," *Central America Report* (Inforpress Centroamericana, Guatemala City, Guat.), Vol. XVI No. 9, March 3, 1989, at 70

STUDENTS THREATENED BY NEW DEATH SQUAD

Flyers dispersed by a March 1 "pamphlet-bomb" explosion in front of University Students' Association (AEU) headquarters in Guatemala City contained death threats against a dozen student leaders. The communiqués bore the by-line of the new "Double J" death squad (*CAR* XVI 7). Since the incident, the AEU charges it has received threatening phone calls, and leaders have been watched and followed by unidentified men.

Two blood-spattered letters were disseminated. The first was addressed to the AEU, and targeted Edin Boanerges Hernández, Héctor Salvatierra and Aharon

Ochoa.* It accused them of being members of the Guatemalan Workers Party (PGT) "6 de Enero" group (*CAR* XVI 8) and of trying to "confuse and deceive the student population and the people of Guatemala" through the upcoming *Huelga de Dolores,* an annual student activity parodying the government and other Guatemalan institutions and events. "We are watching you," the Double J said, "and it would be better for you to stop what you're doing; . . . there is still time to save your lives."

In a post script, the writers added that they had sent copies of the letter to army intelligence and the US Embassy.

The second letter was addressed to 12 AEU members, who it said were on a death list. "We are free to act," the authors warned, "and we will act."

Interior Minister Roberto Valle Valdizán has encouraged the student leaders to utilize the investigative services under his command. "The young people of the AEU, who we know fulfill an important role benefitting student interests, should have confidence in the government and openly explain their problem, so that we can investigate it," he said, claiming that the regime is a guarrantor of respect for human rights.

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* Shortly after the threats were received, Ochoa's house was sprayed with gunfire.

APPENDIX C-3

"Guatemala – Repression Hits the National University," ***Central America Report*** **(Inforpress Centroamericana, Guatemala City, Guat.), Vol. XVI No. 36, September 15, 1989, at 281-282**

Guatemala

Repression hits the national university

In a climate of increasing political violence in Guatemala, the San Carlos national university becomes a target, with eleven students kidnapped since mid August. Four of the kidnapping victims have turned up dead. The Asociación de Estudiantes Universitarios (AEU) blames the government, who in turn points the finger at sectors of the extreme right it says are trying to destabilize the democratic process.

Urban Violence Brings Back Shades of the Past. *It is common these days to see Guatemalans grouped around street corner newspaper stands, commenting with hushed voices on the daily headlines that announce what has become a tangible rise in urban political violence in the last few weeks. Many agree with labor spokesman Juan Francisco Alfaro Mijangos that the spate of bombings and assassinations of public figures and popular sector leaders raises memories of the late 1970s and early 1980s, when it was standard fare.*

The kidnapping of eleven university students in 20 days is the most recent incident to capture press headlines. On September 10, the bodies of four students were found on the outskirts of the university grounds. The bodies were identified as: Carlos Humberto Cabrera Rivera, 45, a teacher, humanities student, member of the teachers union's national assembly and

of the leftist Unidad de Acción Estudiantil (UNASE), kidnapped two days before; husband and wife, Victor Hugo Rodriguez Jaramillo, 35, and Silvia María Guadalupe Azurdia, 29, former members of the also leftist Movimiento Estudiantil Universitario (MEU) kidnapped on August 21; and Carlos Leonel Chutá Camey, 27, a law student, AEU finance secretary and leader of another leftist student group, AVANZADA, kidnapped on September 9. The four bodies showed signs of torture, including needle marks, with the cause of death determined to be multiple stabbings.*

Alongside the bodies appeared flyers claiming the killings were aimed at "dignifying" the AEU. The sheets charged Chutá with stealing 35,000 quetzals from the student association, denounced Cabrera as an opponent of university reform, and accused Rodríguez of being a government spy. Student spokespersons concede there may be a grain of truth to the charges of corruption and division within the AEU, but say such rumors have been blown out of proportion to serve as a cover-up for the murders. Meanwhile, following the discovery of the four bodies, two more students were kidnapped, one from the law school and the other from the chemistry and pharmacy school.

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* This is not the first time in the last few years student organizations have faced acts of intimidation. In March 1989, the entire AEU governing council received death threats (*CAR* XVI9), while in July 1988, the AEU secretary of cultural and sports affairs, Oscar Monterroso and another student were attacked in Guatemala city's Zone 5 by 20 armed men in four vehicles. Monterroso escaped but his friend, Adrián Guerra Roca, was kidnapped and found shot to death later that night (*CAR* XV 29).

The AEU has organized several protest marches.** Leaders say the killings are part of a plan to crush the student movement. Authorities from the regional Consejo Universitario Centroamericano (CSUCA) travelled to Guatemala to investigate the crime. They did not accuse anyone but expressed concern that the government did not seem interested in solving the case.

The student kidnappings are not the only incident to cause alarm among Guatemala City residents. On September 5, mortar shells were fired at the third floor of the national telephone company's headquarters in the capital's downtown district, while on September 9 a bomb was set off at the Camino Real Hotel in the well-to-do Zone 10 district. Minutes earlier another bomb exploded in a nearby shopping center. A total of 27 deaths are attributed to political violence in the first two weeks of September.

The government's response has been to deploy its combined security force SIPROCI in the capital and to increase spot checks of automobiles, buses and pedestrians. The Catholic Church is promoting the formation of a citizen's front against repression, while business groups are calling for the replacement of the interior minister. The congressional human rights commission has requested that a UN human rights envoy be sent to the country, and

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** During the first demonstration, students captured a plainclothes police agent participating in the march. Two other security agents identified by the students fled the scene. In addition, leaders denounced that following the march two students were detained by police, although they were released hours later through international pressure.

the US State Department this week issued a hard travel advisory on Guatemala in response to the rising violence. The warning, which took Guatemalans by surprise, advises US citizens to take precautions when traveling in the country because of the increased violence. The advisory was much broader than the previous warning and mentioned specifically terrorist bombings in the capital and highway robberies on the road to Panajachel, Guatemala's major tourist spot on Lake Atitlán. In addition, it mentioned continuing guerrilla activity in the departments of Petén, Quiché, Huehuetenango, Sololá, Chimaltenango and Escuintla.

Political Terror Again the Motive. The question of just who is behind the violence is a hot topic. The Christian Democrats say it is the extreme right, which they claim is trying to achieve through force of arms what it can no longer get at the ballot box. According to this view, rightist sectors are mounting a destabilization campaign designed to expose the weakness and corruption of the regime. It has been hinted in the press that former head of state General Efraín Ríos Montt and ex-Foreign Minister Fernando Andrade Díaz-Durán, would favor a military coup.

The official position was expounded upon by Defense Minister General Héctor Gramajo. Speaking at a roundtable sponsored by the Centro de Estudios Estratégicos para la Estabilidad Nacional (ESTNA), a civilian-military think tank, Gramajo warned that democracy in Guatemala is threatened by those sectors who still adhere to the national security doctrine in vogue prior to 1982. This doctrine, the defense minister explained, sought to combat Marxist penetration by any means

available, which inevitably led to extreme social polarization in the early 1980s. In the wake of the 1982 coup, the army has taken a different approach, moving from the doctrine of national security to the doctrine of national stability, which seeks harmony between the various power blocs in the country. But there are still those to whom this change has been "traumatic," Gramajo continued, such as the military and business figures behind the 1988 and 1989 coup attempts. These groups believe the only way to combat subversion is through an iron hand policy.

Nevertheless, the government is under fire from all sides for not doing enough to stem the violence. Another view is that of the URNG guerrillas: the Cerezo administration has not taken a more aggressive stance in punishing those responsible because actions like kidnappings of students come from G-2 army intelligence.

APPENDIX C-4

Pro Justice and Peace Committee of Guatemala, "Case No. 5" ***Human Rights in Guatemala, 1990 Supplement*** **(1991) at 15**

HUMAN RIGHTS IN GUATEMALA

SUPPLEMENT

1990

Case No. 5

Name:	Orlando Estuardo Alvarado Morales
Place:	Guatemala City
Incident:	Extrajudicial execution preceded by kidnapping
Date:	October 20, 1990
Responsible:	Paramilitary groups

Orlando Estuardo Alvarado Morales, teacher, ex-student leader and student of Anthropology and History at the San Carlos University, was kidnapped by armed men dressed as civilians. The incident occurred while the victim was attending mass at the Metropolitan Cathedral, only a few meters from the National Palace and the Presidential Palace an area heavily guarded by military and police. Alvarado was then taken away while helpless onlookers stood by. Many of Alvarado's colleagues and students from the government institute "María Luisa Samayoa Lanuza" and "Colegio Miguel de Cervantes", in addition to others, held a massive demonstration demanding Alvarado's live-appearance. However, his corpse appeared floating on Lake Amatitlán showing

signs of bullet wounds and torture. In 1980, the victim's brother was kidnapped and executed; Orlando Estuardo was a student leader at the University of San Carlos at the time.

* * *

APPENDIX C-5

"Extrajudicial Executions," ***Human Rights Update,*** **#9 (Guatemala Human Rights Commission/USA), March 11, 1991, at 2**

* * *

EXTRAJUDICIAL EXECUTIONS

The body of SERGIO GONZALEZ BARCO was found on February 25 in La Trocha, 8th Street and 11th Avenue, Nueva Concepcion, Escuintla. He had been shot.

Three members of the Florian Villatoro family were extrajudically executed on March 2-3. LUCAS FLORIAN VILLATORO (17) was abducted by unidentified men on March 2 in Cuyotenango, Suchitepequez, while he was headed in the direction of his home. (The family lives in Sector Salama, La Maquina II, San Andres Villaseca, Retalhuleu.) The same day, while his mother was reporting his detention-disappearance to the authorities, a group of heavily armed men in a pickup truck arrived at the Florian home, broke down the door and then strangled and shot to death Lucas Florian's brother, ANACLETO FLORIAN VILLATORO (22), in the presence of

his father and his younger brother, ELIAS FLORIAN VILLATORO (13). The men then abducted Elias. The next day, the bodies of Lucas and Elias Florian Villatoro were found in two different locations in La Maquina II, with signs of torture and strangulation and bullet wounds to the head ["tiro de gracia"].

The decapitated body of ARNOLDO CARDONA CONTRERAS (37) was found on March 3 near km 6.5 of the road between Antigua Guatemala and Santa Maria de Jesus, Sacatepequez. Cardona Contreras, who was a student in Guatemala City, had been abducted several days earlier, and his family had reported his detention-disappearance to the "Abductions and Extortion" branch of the Criminal Investigations Department. The victim was identified by means of documents found on his headless and decomposing body. Cardon Contreras was a native of Jutiapa.

The body of ALFONSO AREVALO CHAJON (23) was found on March 3 near km 4 of the road between Cuilapa and Chiquimulilla, Santa Rosa. He had been shot several times. Arevalo Chajon had been abducted by armed men on January 25 at his home in Canton La Quebrada, Barberena, Santa Rosa.

GONZALO GARCIA DIVAS (18) was shot to death on March 3 by a group of unidentified men, in a street in Guasacapan, Santa Rosa.

JOSE ANTONIO LOPEZ ROCA was shot to death on March 3 in a street in Agua Blanca, Jutiapa, by a group of armed men who attacked him while he was on his way to work.

RUBEN OSORIO MORATAYA was shot on March 3 by a group of unidentified men in Santa Maria Ixhuatan, Santa Rosa. He died in the hospital in Cuilapa.

ANTONIO DE JESUS RECINOS LEMUS (40) was shot to death on March 3 by a group of unidentified men, on a dirt road connecting Asuncion Mita and Guevara, Jutiapa.

The body of farmworker SANTIAGO CARMELINO REYNOSO (38) was found on March 3, with stab wounds, bruises and fractures in the right leg. He had disappeared on February 11 after leaving his home in Santa Lucia Talahi, Tajumulco, San Marcos to sell clothing in Tajumulco.

The body of PABLO FLORES VALENZUELA (28) was found on March 4 under the Poza del Tempisque bridge in Quezada, Jutiapa. He had been shot several times. Flores Valenzuela had been abducted by armed men on February 25 at his home in Quezada.

* * *

APPENDIX C-6

"Urgent Action", *Amnesty International USA*, July 19, 1991

[LOGO]

AMNESTY INTERNATIONAL USA

URGENT ACTION PROGRAM OFFICE • P.O. BOX 1270 • Nederland, CO 80466-1270 • 303-440-0913 • FAX: 303-258-7881

UA 247/91 Fear for Physical Safety 19 July 1991

GUATEMALA: Otto PERALTA, student leader
Carmen REYNA, (f) student leader

Amnesty International is concerned for the safety of Otto Peralta and Carmen Reyna, two leaders of the Asociación de Estudiantes Universitarios (AEU), University Students Association, of the University of San Carlos (USAC) following three incidents in which men who identified themselves as members of the National Police called on their homes and interrogated their families. The men questioned the families about the participation of Otto Peralta and Carmen Reyna in February 1991 at the 47th General Assembly of the United Nations (UN) Human Rights Commission in Geneva, Switzerland, where they both gave evidence to the Human Rights Commission on the human rights situation in Guatemala.

On 29 June 1991, a man dressed in plain clothes called at the Guatemala City home of AEU leader Carmen Reyna. Carmen Reyna was not at home. The caller showed the family a police badge and said he was a member of the Departamento de Investigaciones Criminológicas de la Policia Nacional (Criminal Investigations Department of the National Police). He asked the family detailed questions about Carmen Reyna's visit to Geneva to attend the UN. He wanted to know who had sponsored the visit of the AEU delegation, why the delegation went there and

what they did there. The family stated that the man filled in what seemed like an official police questionnaire. He also had details of the flights the delegation had taken to Geneva and how long they had stayed there. When the family asked why the police needed this information, they were told it was for Carmen Reyna's protection.

Following the incident, Otto Peralta, Secretary General of the AEU, as well as USAC Rector Alfonso Fuentes met on 12 July 1991 with the Minister of the Interior, Fernando Hurtado Prem. The Minister assured them that no investigation had been ordered by the National Police. On that same day, a man answering the same description as the one who went to Carmen Reyna's house visited the home of Otto Peralta. He was not at home at the time, but the caller again identified himself as being from the National Police and asked similar questions of Otto Peralta's family. On the following day, 13 July 1991, the same man called again at Carmen Reyna's house, this time in the company of three other men dressed in plain-clothes and driving a four wheel drive vehicle with foreign plates. They again asked the same questions of the family, and again insisted that the investigation was being carried out for the protection of Carmen Reyna and Otto Peralta. Amnesty International is concerned for the safety of Carmen Reyna and Otto Peralta and is calling on the government to investigate these incidents.

BACKGROUND INFORMATION

The AEU leadership and membership has been continually targeted under successive regimes in Guatemala. Amnesty International has documented scores of cases of students and their leaders who have been extrajudicially

executed or "disappeared" under military and civilian governments over the past 30 years. In August and September 1989, at least 12 students and staff from the USAC were "disappeared", seven of whom were subsequently found dead. A number of the victims were reportedly leaders of the AEU.

Since the new government of President Jorge Serrano Elías came to power in January 1991, Amnesty International has learned of increasing numbers of trade union leaders and members of popular movements, including the AEU, who have been subjected to threats, harassment, attempted abduction and possible extrajudicial execution. The choice of the victim and the manner in which these abuses have been carried out suggest the involvement of the security forces in the guise of the so-called "death squads". Many trade unionists and members of popular movements have been forced to leave the country.

RECOMMENDED ACTION: Telegrams/telexes/faxes/ express and airmail letters:

- expressing concern that individuals apparently posing as members of the National Police have been harassing Otto Peralta and Carmen Reyna in circumstances which raise fears for their safety;

- also expressing concern that these visits were made because of their legitimate work in monitoring the human rights situation in Guatemala;

- asking for an investigation into the incidents mentioned above, and that those found responsible be brought to justice.

APPEALS TO: [Suggested Salutation]
Jorge Serrano Elías [Excelentísimo Sr. Presidente]
Presidente de la República de Guatemala
Palacio Nacional (Telexes: 305 5331 CAPRES GU)
Guatemala, Guatemala
(Telegrams: Presidente Serrano, Guatemala, Guatemala)
(Faxes: 011 502 2 537472; 011 502 2 519702)
(Tel No: 011 502 2 21212; 011 502 2 22266)

Lic. Fernando Hurtado Prem [Señor Ministro]
Ministro de Gobernación
Despacho Ministerial
Oficina No. 8, Primer Nivel (Faxes: 011 502 2 518105)
Palacio Nacional (Telexes: 305 5085 MINGOB GU)
Guatemala, Guatemala
(Telegrams: Ministro Gobernación, Guatemala, Guatemala)
(Tel No: 011 502 2 21212, ext 500; 011 518105-6)

Cnel. Julio Enrique Paiz Bolaños [Señor Director]
Director General de la Policía Nacional
6 Avenida 13-71
Zona 1, Guatemala, Guatemala
(Tel No: 011 502 (2) 20221; 515158)
(Telegrams: Director Policia, Guatemala, Guatemala)

Sra. María Luisa Beltranena de Padilla [Señora Ministra]
Ministro de Educación
Ministerio de Educación
Palacio Nacional
Guatemala, Guatemala
(Tel No: 011 502 2 21212; 011 502 2 20162)
(Telegrams:
Ministra Educacion Beltranena, Guatemala, Guatemala)

COPIES TO:
Lic. Ramiro de León Carpio
Procurador de Derechos Humanos
Avenida Simeón Cañas 10-61
Zona 2,
Guatemala, Guatemala

Diario Siglo XXI
7a Avenida 11-79
Edificio Galerias España, 6° piso
Zona 9, Guatemala, Guatemala

Ambassador
Embassy of Guatemala
2220 R St NW
Washington DC 20008

Lic. Alfonso Fuentes
Rector
Universidad de San Carlos
de Guatemala (USAC)

Ciudad Universitaria
Zona 12, Guatamala, Guatemala

Señores
Asociación de Estudiantes Universitarios (AEU)
Ciudad Universitaria
Zona 12, Guatemala, Guatemala

PLEASE SEND APPEALS IMMEDIATELY. Check with the Colorado office between 9:00 am and 6:00 pm, Mountain Time, weekdays only, if sending appeals after August 30, 1991.

APPENDIX C-7

"Urgent Action", *Amnesty International USA*, August 30, 1991

[LOGO]

AMNESTY INTERNATIONAL USA

URGENT ACTION PROGRAM OFFICE • P.O. BOX 1270 •
Nederland, CO 80466-1270 • 303-440-0913 •
FAX: 303-258-7881

UA 293 /91 30 August 1991

Possible Extrajudicial Execution
and Death Threats

GUATEMALA:
Marlon Alexander SCOTT MOLINA – student
Amilcar MENDOZA – student
Edwin Giovanni HIDALGO JEREZ – Trade Unionist

Amnesty International is seriously concerned at the possible extrajudicial execution of two students and one trade unionist, which took place in the early morning of 25 August 1991 in Guatemala City. Amnesty International is also concerned for the safety of the leadership of the Asociación de Estudiantes Universitarios (AEU), University Students Association, who have recently been receiving anonymous telephone threats.

At 3.00 am on the morning of 25 August, Marlon Alexander Scott Molina and Amilcar Mendoza, both students at the Faculty of Architecture at the Universidad de San Carlos (USAC), San Carlos University, along with Edwin Giovanni Hidalgo Jerez, an electrical worker and member of the Sindicato de Trabajadores del Instituto Nacional de Electrificación (STINDE), Electrical Workers Union, were reportedly shot and killed as they were walking on the street in Zone 5 of Guatemala City. All three bodies showed signs of having been given a tiro de gracia (a finishing shot in the head). One of the students, Marlon Scott was taken to hospital, but was dead on arrival. The other two died instantly.

Marlon Alexander Scott Molina and Amilcar Mendoza were also members of the AEU. The AEU has in the past few months been receiving a series of death threats. Most recently, AEU leaders reported that in mid-August they received anonymous telephone calls warning that four of their leaders were going to die. The AEU believes that the security forces may have been responsible for the three killings because of the manner in which they were carried out. Amnesty International has also learned that three student leaders of the Coordinadora de Estudiantes de

Educación Media (CEEM), High School Students Coordinating Committee, were being harassed and threatened by armed men. The CEEM attribute the threats to CEEM demands for adequate funding for secondary schools. Amnesty International is concerned for the safety of the membership and leadership of the AEU and the CEEM.

BACKGROUND INFORMATION

Student organizations have been continually targeted under successive regimes in Guatemala. Amnesty International has documented scores of cases of students and their leaders who have been extrajudicially executed or "disappeared" under military and civilian governments over the past 30 years. In August and September 1989, at least 12 students and staff from the USAC were "disappeared", seven of whom were subsequently found dead. A number of the victims were reportedly leaders of the AEU. (See Guatemala: Human Rights Violations Directed against Student Leaders, AI Index: AMR 34/52/89 of September 1989). In July 1991 Amnesty International expressed concern for the safety of AEU leaders, Otto Peralta and Carmen Reyna. They had been repeatedly questioned by men posing as members of the Criminal Investigations Department of the National Police about their participation at the 47th General Assembly United Nations (UN) Human Rights Commission in Geneva, Switzerland, where they had given evidence to the Human Rights Commission on the situation of human rights in Guatemala in February 1991.

APPENDIX C-8

"AEU Campus Headquarters Dynamited," *Weekly Briefs* (CERI-GUA Guatemalan News Agency), February 2-8, 1992, at 1-2

AEU Campus Headquarters Dynamited

The office of the University Students Association (AEU) and classrooms in the Schools of Chemistry and Pharmacy suffered considerable damages following the explosion of a high power bomb January 30, reported the daily *Prensa Libre*. AEU General Secretary Otto Peralta called the bombing an act of army intimidation against the AEU. "It's another example of army abuse of power," said Peralta. "If the president is the general commander he should control these terrorist acts against the civilian population." Peralta attributed the attack to AEU's holding a series of forums on the El Salvador peace agreement in addition to housing Committee for Campesino Unity (CUC) representatives in the AEU headquarters during the commemoration of the Spanish embassy massacre.

Defense Minister Jose Garcia Samayoa announced that the military will take Peralta to court on charges of slander and defamation for accusing the army of the AEU bombing. Army public relations (DIDE) spokesman Captain Julio Yon said the army will "exercise its full right in the courts to avoid continuous political manipulation and sensationalism on the part of certain groups or sectors."

Captain Yon said that Peralta is "an evil Guatemalan who on previous occasions has discredited his own country internationally" and he also criticized defamation campaigns aimed at the government and army. Yon's remarks

come in reference to the AEU leader's tour of Europe last year where he spoke before the 1991 United Nations Human Rights Assembly in Geneva. After his return from Europe, Peralta became the object of threats and harassment.

The University of San Carlos (USAC) condemned the attack against the AEU headquarters charging that the bombing was an attack on the democratic peace process. USAC demanded that the government explain the terrorist attempt and called on international solidarily to support united student and grassroots peace efforts. Byron Morales of the Unity of Labor and Popular Action (UASP) told Defense Minister Garcia Samayoa that the army would have to sue millions of Guatemalans for accusing it of human rights violations. UASP called the suit against Peralta a warning of repression to come.

APPENDIX C-9

"Intimidation Against Students Intensifies," *Weekly Briefs* (CERI-GUA Guatemalan News Agency), March 22-28, 1992, at 2

Intimidation Against Students Intensifies

A high-powered explosive was detonated at the San Carlos University school of chemistry and pharmacy. The explosion occurred about 100 feet from the office of the University Student Association (AEU). University spokeswoman Ada Alvarado condemned the bombing.

She said it is the fourth terrorist attack in three months. She said students are dedicating their educational efforts toward achieving peace, democracy and development for all Guatemalans.

In another incident, classes were canceled and 19,000 students evacuated after a false bomb threat was called in. AEU student leader Otto Peralta, who has received threats against his life this week, said the incidents were warnings against student and grassroots participation in the peace process. Peralta said a platoon of military and national police as well as the treasury guard raided the campus in an act of intimidation against annual student protests. Infiltrators are on campus to disrupt the events and identify student leaders, Peralta said.

APPENDIX C-10

" 'Powerful' Bomb Explosion at University Reported," *Guatemala City Teleonce Television*, March 26, 1992 (as reported in FBIS *Latin America Daily Report*, March 27, 1992, at 11)

'Powerful' Bomb Explosion at University Reported

PA2603232092 Guatemala City Teleonce Television in Spanish 1800 GMT 26 Mar 92

[Text] A terrorist bomb exploded on the evening of 25 March in a building of the University of San Carlos in Zone 12. There were no casualties, but there was considerable structural damage. The explosion occurred at 2130

in the third floor of the 10-story building of the School of Chemical Sciences and Pharmacy. Professors and students of that school and some workers were leaving the building when the bomb exploded.

The device was described as powerful by a document published on 26 March by the national university condemning the attack. The explosion shattered numerous glasses and damaged several doors of that building. In its document repudiating this action, the University of San Carlos voiced great concern over this new terrorist attack and made public its vigorous rejection of the use of such criminal practices.

In January, a bomb exploded at the headquarters of the Association of University Students, AEU. AEU Secretary General Otto Peralta accused the Army for this attack, and the Army sued him but later decided to withdraw the lawsuit. Peralta commented on this new attack on student buildings:

[Begin recording] [Peralta] This bomb is another attack of a repressive campaign against the university and popular organizations. As you know, since early this year the university has been the target of a number of attacks and violent actions, murders, and threats. This incident joins the chain of repressive actions against the university.

The primary aim is to silence the voice of the university. If they are not the culprits, we demand the Army and government clarify this and that they condemn and convict those responsible for these attacks. We demand this, and want them to do something about these kind of actions.

It is regrettable that there have been a number of violent actions against the university and not even one has been resolved. This shows evidently that there is no willingness to solve these kind of attacks.

[Unidentified reporter] What time did this happen?

[Peralta] It occurred at about 2145, according to the schools' security guards near the AEU office.

[Reporter] Did they report any suspicious people around the area?

[Peralta] They reported seeing some people in the area at that time that fled through the dark areas of the university, but they were unable to identify anyone because they immediately fled. Unfortunately, the university lacks an internal security force capable of capturing these people immediately. They reported seeing certain individuals but do not know who they were. [end recording]

Meanwhile, the authorities of the University of San Carlos held a news conference on 25 March [date as heard] at the Annex Room of the Superior University Council to establish their position on this attack. The following attended: Dr. Quesada, university secretary general; Mario Rolando Torres, personal adviser to the rector; Victor Alvarez, adviser to the Rector's Office; and Ana Alvarado, chief of the Publicity Office. She opened the conference:

[Begin recording] [Alvarado] All we know, as has been reported, is that this involves groups that oppose the university's contributions to the discussion of the country's problems.

[Reporter] [Question indistinct]

[Alvarado] The device caused considerable damage to the facilities of Building T-10. The estimated damage as of this moment amounts to 20,000 quetzales. The damage mainly consists of shattered glass and lamps, destruction of iron gates, and laboratory equipment in the third floor of the building.

[Unidentified speaker] The security guards could not catch anyone involved in this attack because of the time of the explosion and the size of the university campus. We repudiate this kind of intimidation that obviously seeks to neutralize the university's role in society. We urge the various segments of Guatemalan society to also repudiate this attack. We also urge them to continue coordinating efforts with us to democratize and to bring peace to our country.

We have no major details on this incident. We can report that we drafted a document to the government of the Republic requesting an investigation and voicing our hope that there will be an end to the atmosphere of uncertainty and impunity that prevails in Guatemala. [end recording]

APPENDIX C-11

"Security Forces Accused of Killing Student," *Panama City ACAN*, April 10, 1992 (as reported in FBIS, *Latin America Daily Report*, April 14, 1992, at 31-32)

Security Forces Accused of Killing Student
PA1104002592 Panama City ACAN in Spanish
1623 GMT 10 Apr 92

[Text] Guatemala City, 10 Apr (ACAN-EFE) – The University Students Association (AEU) of Guatemala has accused security forces of opening fire with machine guns on 100 students, killing a youth and wounding seven others.

Student Julio Rigoberto Cuc Quim was killed and Maria Isabal Cabeiro, Julio Felipe Sajche, Otoniel Estuardo Moran, Axel Oswaldo Morales, Alfonso Aldana Perez, Otto Rene Perez Figueroa, and Juan Armado Perez Lopez were seriously wounded in the attack.

The AEU told ACAN-EFE that the machine-gun attack occurred at 0030 (0630 GMT) while students were in the university auditorium preparing for the traditional buffoon parade of the "Strike of Dolores" (huelga de dolores) being held today to criticize government authorities.

The AEU also charged that ever since the strike began, "the repressive government forces have carried out a campaign of provocation and aggression against the students." On 8 April, during a theatrical event, "a group of soldiers" fired on the students, the AEU charged. These actions "prove once again that it is the Army and security forces who maintain terror and repression in Guatemala," the AEU added.

The AEU is demanding that President Jorge Serrano's government conduct an immediate investigation into the attack "staged by security forces" and order the masterminds severely punished. It also requests an immediate end to the general persecution and repression unleashed against university students and the elimination of that repressive corps.

The AEU said it will initiate formal actions against the government. It will hold the Army responsible for any incidents during the XCIV "Strike of Dolores" being held on 10 April.

Gonzalo Asturias, official government spokesperson, recognized that members of the so-called "Hunapu Plan," made up of the Army, National Police, and Treasury Police, were the ones who opened fire on the students. The official told ACAN-EFE: "All of them will be taken before the justice tribunals."

Unofficial sources said the incident occurred after university students blocked access to a vehicle that was transporting security forces. According to reports, the police tried to remove the "hoods covering the students faces, but the students resisted and got on top of the vehicles. That was when members of the security forces opened fire on the university students.

APPENDIX C-12

"Attacks Against San Carlos University Continue," *Weekly Briefs* (CERI-GUA Guatemalan News Agency), April 19-25, 1992, at 2

Attacks Against San Carlos University Continue

Arsonists set fire to the San Carlos University School of Humanities in Quetzaltenango – the fourth attack against university installations in three months. Students hold the government responsible for new violence against the university community which began in January when an explosion destroyed part of the University Student Association (AEU) offices and 15 classrooms in the Chemical Science Department. This same school building was bombed again in March. In February there was an attempted bombing of the university museum, fifteen professors received death threats and one professor and a student were murdered. On April 10, Hunapu forces opened fire on 100 students readying for the traditional "Huelga de Dolores" anti-government demonstration. Various versions have circulated about the events of the shooting and it is uncertain how many students may have been captured. Families of six students have reported their children are still missing.

Defense Minister Jose Garcia denies student charges that the attacks are part of a government attempt to harass the university community.

"Instead of fighting each other or becoming polarized, we should seek reconciliation and understanding," said Garcia. Thousands of students held a march to the National

Palace calling for the abolition of Hunapu and the firing of the interior and defense ministers.

APPENDIX C-13

"Guatemala – Student Killing Further Discredits 'Hunapú'," *Central America Report* (Inforpress Centroamericana, Guatemala City, Guat.), Vol. XIX, No. 14, April 24, 1992 at 112

Guatemala

Student killing further discredits "Hunapú"

One student is killed, seven others seriously injured and 15 reported missing after the special security force "Hunapú" opens fire on university students preparing for their annual protest parade, the Huelga de Dolores."

In the early morning hours of April 10, more than 200 students were preparing floats for their annual parade as part of the "Huelga de Dolores" celebration. The Huelga de Dolores, which began in 1898, is an annual event in which university students satirize the government, politicians, the military and others in various activities including a parade through the streets of Guatemala City. The students were in an area of the city where they traditionally met to prepare floats for the following day's parade and had blocked off the street, as was their custom. A truckload of the special security "Hunapú"* forces

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* *Hunapú is a mythical figure from the Popul Vuh, the sacred book of the Quichés. He was known as a great warrior who killed demons and saved the land.*

turned down the blocked-off street and an altercation began between them and the students. According to student witnesses, the disagreement was settled and the truck was pulling away when the security forces opened fire on the group. One student, Julio Rigoberto Cu Quim, was killed and seven others seriously injured. Students reported that as many as 15 others were missing following the shooting.

After the incident, 29 "Hunapú" members were taken into custody and charged. The attack was condemned by various sectors of Guatemalan society including the Superior Council of the University of San Carlos, where the assaulted students attended law school, the lawyers' association, the labor organization, UASP, and Ramiro de León Carpio, the governmental human rights ombudsman. Carpio blamed the killing on the ministers of defense and the government as well as the heads of the National Police, Treasury Police and Ambulatory Military Police, which make up the Hunapú force, accusations roundly denied by the various officials. Hunapú, created in March obstensibly to combat growing street crime, is widely viewed as a means for the military to reassert control into civilian affairs (*CAR* XIX 10).

Student leaders said that the attack was not an isolated incident, but part of a series of intimidations carried out against the student community in recent months. They noted that in the last few weeks while preparing for the parade, several times Hunapú security forces interrupted them, once firing shots in the air as students were about to begin an open-air theater performance. The student university association has also been under attack in

recent months, with its headquarters bombed and many students going into exile (*CAR* XIX 4).

Three days later, at an April 13 press conference, Minister of Defense General José Domingo Samayoa blamed the incident on the students saying they initiated the shooting and forced Hunapú troops to respond. None of the 29 security agents captured were allowed to make a statement until three days after the incident, coinciding with Samayoa's press conference.

Journalist Carlos Rafael Soto, writing a column titled "Who's Lying," in *El Gráfico* on April 16, stated that the army's role in civilian security was bound to sooner or later end in tragedy. He questioned the army's contention that the students had shot first, pointing out that initial army reports failed to mention the students' attack. "These supposed shots by the students against the police were the best argument that the army could have used. If they weren't brought forth at first, one can only think that they didn't occur and that they were concocted after the tragedy, to try to justify the police attack against the students, not as a savage and repressive act, but as a logical response to an armed attack."

The Association of University Students (AEU) has begun its own proceedings, apart from the charges the police and military officers face. In a formal accusation before a judge, accusing the ministers of defense and government as well as the heads of the three security forces of assassination, attempted homicide and grave injuries.

Fernando Hurtado Prem, the minister of government, announced that the army may withdraw from Hunapú in

May, saying that they are no longer needed because 1,000 new police officers have begun training at the National Police school.

APPENDIX C-14

"Policemen Attack Students," *Information on Guatemala* (Enfoprensa/USA), No. 475, May 4, 1992, at 3-4

POLICEMEN ATTACK STUDENTS

Members of the anti-riot squad of the National Police violently broke up a demonstration held by students of the National Central Institute for Boys (INCV) in city zone 1, on April 28. It was confirmed that security forces detained more than one hundred youngsters.

On the following day, police units carried out a similar action against students of the Central Normal School for Boys (ENCV), zone 13, who were protesting against the abuses suffered by their friends of Central Institute. One of the teachers explained that "the boys were carrying out a peaceful demonstration when police began beating them up, leaving 10 wounded who received no medical assistance by order of the police."

The parents of Amado Estuardo Lopez, aged 13, denounced on May 2 that their son received emergency treatment in a medical center after being beaten by the police who also forced him to drink chlorine seriously "upsetting his health."

The Student Coordinating Committee for Middle Education (CEEM) stated that their friends are still being held in the Preventive Detention Center in Zone 18 where they lack medical attention and are injected with unknown chemical substances.

"Prensa Libre" in its editorial of May 4 recommended that the youngsters be released, considered their detention illegal and confirmed that the place where they are being held hardly meets the conditions for the boys to be properly treated. President Serrano later announced a "hard treatment" to those students who insist on demonstrating.

APPENDIX C-15

"High School Students Attacked by Police, Army," *Guatemala Human Rights Update*, #9/92 (Guatemala Human Rights Commission/USA), May 4, 1992, at 4

High School Students Attacked by Police, Army A riot police unit, assisted by Kaibil (Army Special Forces) troops, broke into the Central Institute for Boys in Guatemala City and arrested 112 students. The students, who were reportedly sentenced to 45 days in prison, had apparently been blocking traffic and burning tires to protest the Government's failure to appoint needed staff to the high-school, which is located in Zone 1.

The day after the incident, students from another secondary school, the Normal Central School for Boys in Zone 13, were beaten by riot police during a peaceful

demonstration held to protest the mass arrest. Twelve students were seriously injured, and it was reported that 72 boys had been arrested. The incidents have provoked protest strikes at several other secondary schools.

APPENDIX C-16

"Students Released From Jail Show Signs of Abuse," *Guatemala City Siglo Veintiuno*, May 6, 1992, at 3 (as reported in FBIS *Latin America Daily Report*, May 8, 1992, at 15)

Students Released From Jail Show Signs of Abuse
PA0705165092 Guatemala City SIGLO VEINTIUNO
In Spanish 6 May 92 p 3

[Text] It was officially announced on 5 May that 160 students incarcerated at the Fraijanes Detention Center for Minors for rioting will be released today at 0800 by virtue of a decision adopted by three judges.

Antonio Calderon, first juvenile court judge, stated that during a meeting of Juan Jose Rodil Peralta, president of the judicial branch and the Supreme Court of Justice; National Association of High School Students representatives; and the human rights attorney, it was agreed to expedite the aforementioned measure.

Calderon stated that on 5 May he visited the installations of the Detention Center and confirmed that some youths had match burns on their faces and backs.

In addition, those affected told the judge that during their arrest, the police officers threw "a red powder" on them, causing vomiting and an allergic reaction. The youths said they were taken to the Detention Center without receiving medical attention.

Calderon confirmed that many of the detained students had sustained contusions on their legs, inflicted by the police. The youths said they will file penal charges against the policemen through their parents.

On the afternoon of 5 May, the courts began issuing liberation orders for the first group of students; therefore, most students will be released to their parents, the judicial official concluded.

After the talks, Rodil contacted the juvenile court judges urging them, if possible, to release the youths as a show of goodwill and to ensure that tranquillity returns to the student community and teachers' associations.

After analyzing the recommendations, the judicial officials, who are aware of the situation of the students arrested by the public force, agreed to dismiss the proceedings in an attempt to calm the population.

APPENDIX C-17

"Teenage Students Tortured and Threatened," *Weekly Briefs* (*CERI-GUA*, Guatemalan News Agency), May 10-16, 1992, at 3

Teenage Students Tortured and Threatened

Students from the Normal and Central Institutes who were arrested during recent protests over insufficient teachers say they were tortured and threatened while detained. Jorge Garcia of the National Association of Middle School Teachers (ANEEM) said some of the students say they were burned with a kind of powder, and others were removed to isolated locations where authorities then threatened to kill them.

Thousands of students and teachers from 32 capital schools demonstrated in front of the Presidential Palace on May 13. They demanded investigations of security actions during the student uprisings the last week of April, in which 188 students were arrested. ANEEM President Jorge Garcia demanded that the Interior Minister and two police chiefs be prosecuted for the attacks on Normal and Central students. Protesting students and teachers also demanded the release of the 28 students over 18 years old who are still in detention, and the resignation of the Education Minister. Garcia added that teachers support the students in demanding solutions to the educational crisis.

APPENDIX C-18

"Police Forced Student to Swallow Chlorine," *Guatemala Human Rights Update*, #10/92 (Guatemala Human Rights Commission/USA), May 18, 1992, at 1

Police Forced Student to Swallow Chlorine High-School student AMADO ESTUARDO LOPEZ (13) had to undergo surgery after riot police forced him to swallow chlorine and beat him on the esophagus. Lopez and approximately 10 other students from the Normal Central School for Boys were injured by police on April 28 during a student protest in Guatemala City. (See Human Rights Update #9 and other stories in the current Update.) Lopez's parents have demanded that criminal proceedings be brought against those responsible.

The Secondary School Students Coordinating Committee (CEEM) says that other students remaining in jail are being denied medical attention for their injuries.

APPENDIX C-19

"Bomb Scares in High Schools Continue," *Guatemala Human Rights Update*, #12/92 (Guatemala Human Rights Commission/USA), June 15, 1992, at 3

Bomb Scares in High Schools Continue Both the Oscar de Leon Palacios high school and the adjacent Maria Auxiliadora high school in Barrio La Independencia, Coatepeque, Quetzaltenengo were evacuated on May 28

after receiving telephoned bomb threats. In recent months students have organized to pressure for improved teaching materials and study programs, and their efforts have been met with violent repression. The May 31 killing of Dr. Oscar Enrique Ponce Flores of USAC is the latest example of how attacks on educators and students have increased in recent months. (See EXTRAJUDICIAL EXECUTIONS above.) Students believe that these attacks are an attempt by security forces to silence their activities.

APPENDIX C-20

"Urgent Action Appeal" *Amnesty International*, July 9, 1992

[LOGO]

URGENT ACTION APPEAL

URGENT ACTION PROGRAM OFFICE • P.O. BOX 1270 •
Nederland, CO 80466-1270 • 303-440-0913 •
FAX: 303-258-7881

UA 230/92 9 July 1992
GUATEMALA

Possible Extrajudicial Execution
Rodnery RODRIGUEZ VALDIZON, aged 26
Emilio GONZALEZ GUERRA, aged 26
Luis MORALES ZAVALA, aged 25

Amnesty International is concerned at the killing on 5 July 1992 of agronomy engineer, Rodnery Rodríguez Valdizón, and students Emilio González Guerra and Luis

Morales Zavala in circumstances suggesting possible security force involvement.

At about 6:30 am on 5 July 1992, Emilio González Guerra and Luis Morales Zavala, both students at the Economics Faculty of the Universidad de San Carlos (USAC), San Carlos University, drove Rodnery Rodríguez Valdizón, also a member of USAC to the airport where he was due to fly to Petén department in northern Guatemala. According to the information made available to Amnesty International, as they were approaching La Aurora Airport in Zone 13 of Guatemala City, another car intentionally collided with the vehicle they were driving. Several unidentified armed men got out of the other car and shot at them with machine guns. All three were killed immediately.

Amnesty International is concerned that the manner in which the killings were carried out, ie in broad day-light, in an area normally under surveillance by the security forces, and the involvement of unidentified men in plain clothes using automatic weapons, suggests that they may have been carried out by members of the security forces or those working with their connivance in the guise of so-called "death squads". Amnesty International's concern is heightened at a time of increased human rights violations against university staff and students

BACKGROUND INFORMATION

In recent months, leaders of human rights and trade union organizations, students and university teachers have been the subject of a renewed wave of threats and intimidation. On 14 May 1992 Andrés Ramírez Lara, a

university lecturer at the Faculty of Economics, and José Arana Paz, a student at the Faculty of Psychology at the USAC, were killed in circumstances suggesting official security force involvement. Andrés Ramírez Lara had previously received anonymous death threats. On 10 April 1992, one student was killed and seven others wounded when members of the Hunapú (Hunters) security force unit opened fire on a group of students, who were preparing for their traditional Easter celebrations. In February 1992, university lecturer Pedro Us Soc and his wife Floridalma Ixtahualán received a series of threats, apparently linked to their association with Manuel Estuardo Peña, a professor of History at the USAC, who was shot "death-squad" – style.

President Jorge Serrano Elías came to power in January 1991. During his presidential campaign he had pledged to ensure protection of human rights. However, Amnesty International remains seriously concerned at continuing human rights violations in Guatemala, including extrajudicial executions, death threats, torture and "disappearances". Even in cases where the identity of the perpetrators is unclear, the choice of victim and the manner in which the abuses have been carried out frequently suggest the involvement of members of the official security forces.

APPENDIX C-21

"Bomb Found in Theater," *Weekly Briefs* (*CERI-GUA* Guatemalan News Agency), August 2-8, 1992, at 3

Bomb Found in Theater

Students presenting a play on human rights were the target of a bomb threat, *Radio Independiente* reported August 5. The students at the Western University Center (CUNOC) in Quetzaltenango say an anonymous caller warned them a bomb had been placed in the theater. Police found the bomb hidden in a plastic container and deactivated it. The students say that despite the warning, they will continue to present the play, "no matter what the price."

APPENDIX C-22

"AEU Offices Bombed," *Guatemala Human Rights Update*, #20/92 (Guatemala Human Rights Commission/ USA), October 5, 1992, at 4

AEU Offices Bombed. On October 5, at 7:15 p.m., two bombs exploded at the offices of the Association of University Students (AEU) at the main campus of the University of San Carlos in Guatemala City. The bombs apparently had been planted beneath the windows, outside the building. The explosion caused extensive structural damage to the windows, the building, and equipment and furniture in the offices. Reports of injuries to students in the building at hour of press had not been confirmed, but at least one student was injured and taken

to the hospital. *El Grafico* reported on October 6 that as many as five students were injured in the explosion.

Since the bomb attacks on the offices in January and February of this year (see Human Rights Update #3, #4, 1992), students at the AEU offices have received numerous bomb threats from anonymous callers. OTTO PERALTA, president of the AEU, has received numerous death threats, and he reports that he is under constant surveillance.

In response to these attacks, the Center for Human Rights Legal Action, in Washington, DC, has filed a complaint against the Guatemalan government with the Inter-American Commission on Human Rights of the OAS.

APPENDIX C-23

George Rodríguez, "Attacks Denounced as Part of a Campaign of Terror," Inter Press Service (PeaceNet), October 9, 1992 [as reported in *Central American News-Pak* (Documentation Exchange, Austin, TX), Vol. 7, No. 18, October 5-18, 1992, at 8]

ATTACKS DENOUNCED AS PART OF A CAMPAIGN OF TERROR

Inter Press Service (PeaceNet)
9 October 1992

by George Rodríguez

GUATEMALA, Oct. 6 (IPS) – Bombing attacks against a student organization and a weekly magazine in Guatemala City Monday night were denounced by the victims on Tuesday as part of a campaign of intimidation.

"This is part of a terrorist campaign against the labor and popular movements, to prevent their participation in the peace process," Otto Peralta, the secretary general of the Association of University Students(AEU), said.

At a press conference, Peralta condemned the bombing attack against AEU's headquarters on the grounds of the San Carlos State University (USAC), in the western part of this capital city.

Journalist Hugo Arce, director and columnist for the magazine *Tinamit*, said the bombing of *Tinamit's* office was "new repression against the press."

The nearly simultaneous bombings caused extensive material damage, but no injuries.

The bombing at the university was the third attack against the student organization. After a similar bombing on January 30, Peralta accused the military of responsibility.

Peralta said that AEU has received "numerous anonymous letters and threatening phone calls" since April 10, when one student was killed and six others injured in the confrontations with the military security police, Hunapu.

The student leader said the attack was part of the particularly intense harassment this year, which "has prevented the university from academically addressing the nation's problems."

Peralta pointed out that USAC recently published the book *Massacres in the Jungle*, but was forced to cancel its official release last month following a series of threats against university personnel.

Speaking minutes after the attack against *Tinamit*, Arce said that a week ago, following the publication of an article critical of an army official, the magazine received a threat that "something was going to happen."

"They did not specify what it would be, a bomb or a personal attack."

Calling the bombing "a threat against all the press," Arce said the attack against *Tinamit*, a publication often critical of the government, comes a little more than a year after numerous media sources – including IPS – were the targets of threats, and in some cases, direct aggression.

On Tuesday, the Association of Guatemalan Journalists (APG) issued a declaration stating that the attack "violates the constitution and existing laws protecting the press."

Monday's bombings are the first attacks since the wave of aggression that swept this capital between late May and the end of April.

The two attacks occurred just hours before the end of a 10-day visit by Christian Tomuschat, the United Nations Observer for Human Rights to Guatemala, to evaluate the human rights situation.

In January, Tomuschat will present a report of his findings to the United Nations Commission on Human Rights. Tomuschat was appointed by the U.N. Commission based on reiterated charges of human rights abuses in Guatemala, attributed primarily to the army and paramilitary groups and, to a lesser extent, to rebel groups.

APPENDIX C-24

"Urgent Action Appeal" ***Amnesty International*** **October 8, 1992**

[LOGO]

URGENT ACTION APPEAL

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FAX: 303-258-7881

UA 313/92 Death Threats/Intimidation 8 October 1992

GUATEMALA: Members of the Asociación de Estudiantes Universitarios

Amnesty International is seriously concerned for the safety of members of the Asociación de Estudiantes Universitarios, AEU, and for the safety of those students involved in court proceedings against members of Hunapú, the Guatemalan special security force unit.

On 5 October 1992, a bomb exploded outside the offices of the AEU at the Universidad de San Carlos (USAC) in Guatemala City. The bomb explosion follows a series of death threats received by members of the AEU and students involved in a legal action against Hunapú. Hunapú were responsible for the killing of 10 April 1992 of student Julio Cu Quim.

The AEU reported that during May 1992 several students were followed by armed men in plain clothes. They also reported receiving written death threats, which demanded that the students involved in the legal action against members of the Hunapú unit withdraw their action. Otto Peralta, AEU president, also reported that armed men riding a motorcycle were watching his house and noting the movements of his family. The girlfriend of

one of those injured during the 10 April 1992 incident reportedly received an anonymous written death threat which stated "we are aware that you are the people who head the list of eight people who will be eliminated, if you continue your accusations against members of Hunapú".

A relative of Axel Morales Gaytán, another of the students wounded on 10 April 1992, also received an anonymous letter, similar to the one above, which threatened that the next time they would kill members of the families of those bringing legal actions against the security forces.

In August 1992 a written death threat signed by "Members of the Security Forces", invited five AEU members, Axel Morales, Otto Pérez, Julio Sanchez, Hugo Gudiel and Otto Peralta to a meeting at the "La Villa" Cemetery on 25 August at 3.00 p.m. The letter said that the motive for the meeting was to reach a solution with those persons affected in relation to the events of 10 April 1992. The death threat was sent directly to an individual who for security reasons does not wish to be named, but who was also invited to the meeting and threatened that "We don't want blood, you will be the person most affected if the conditions we ask for are not adhered to". Among the conditions were that no publicity be given to the letter and that no member of the media attend the meeting.

A second bomb exploded on 5 October 1992 at the offices of the weekly magazine Tinamit. Tinamit has published articles critical of the government and has reportedly received death threats as a result. Amnesty International

is concerned for the safety of journalists and workers at Tinamit magazine.

BACKGROUND INFORMATION

Journalists, as well as students and university teachers have in recent months been the object of repeated human rights violations, threats and intimidation. On 14 May 1992 Andrés Ramírez Lara, a university lecturer at the Faculty of Economics, and José Arana Paz, a student at the Faculty of Psychology at the USAC, were killed in circumstances suggesting official security force involvement. Andrés Ramírez Lara had previously received anonymous death threats. In February 1992, university lecturer Pedro Us Soc and his wife Floridalma Ixtahualán received a series of threats, apparently linked to their association with Manuel Estuardo Peña, a professor of History at the USAC, who was shot "death-squad"-style. A bomb was planted in the AEU building on 30 January 1992.

RECOMMENDED ACTION: Please send telegrams/telexes/faxes/express and airmail letters:

- expressing concern at the bomb attacks and threats and intimidation directed against leaders and students of the AEU;
- asking for an immediate investigation into these incidents, including the bombing of the offices of Tinamit magazine and that those found to be responsible be brought to justice;
- asking for guarantees for the security of all students, citing especially those students named in the death threats as being targeted because of their involvement

in a legal suit against the security forces and for the safety of workers and members of Tinamit.

APPEALS TO:	**[Salutation]**
S.E. Jorge Serrano Elías Presidente de la Republica de Guatemala Palacio Nacional Guatemala, GUATEMALA	[Sr. Presidente/ Dear President] (Telexes: 305 5331 CAPRES GU) (Faxes: 011 502 2 537472, 011 502 2 519702) (Telephone: 011 502 2 21212, 011 502 2 22266)
Lic. Ramiro de León Carpio Procurador de Derachos Humanos Avenida Simeón Cañas 10-60 Zona 2, Guatemala, GUATEMALA	[Sr. Procurador/ Dear Mr. Procurator] (Human Rights Procurator) (Faxes: 011 502 281734) (Telephone: 011 502 2 300874 – 76)
Gral. José García Samayoa Ministro de Defensa Ministerio de Defensa Palacio Nacional Guatemala, GUATEMALA	[Sr. ministro/ Dear Minister] (Minister of Defence) (Telexes: 305 5361 COMGUA GU) (Telephone: 011 502 2 21212, 011 502 2 2226)
Lic. Juan José Rodil Peralta Presidente de la Corte Suprema de Justicia Centro Cívico 21a Calle y 7a Avenida Guatemala, GUATEMALA	[Sr. Presidente/Dear Mr. President] (President of the Supreme Court) (Telephone: 011 502 2 84323, 011 502 2 843203-08)

COPIES OF YOUR APPEALS TO:
Lic. Acisclo Valladares Molina
Procurador General de la Nación (Attorney General)
Procuraduría General de la Nación
18 Calle 10-36
Zona 1, Guatemala, GUATEMALA

(Head of the Presidential Coordinating Commission of the Policies of the Executive relating to Human Rights)
Sr. Barnardo Neumann

Comisión Presidencial Coordinadora de la Política del Ejecutivo en materia de Derechos Humanos (COPREDEH)
15 Avenida 18-38, Zona 13
Guatemala, GUATEMALA

(University Students Association of the University of San Carlos) Asociación de Estudiantes Universitarios (AEU)
Ciudad Universitaria
Zona 12, Guatemala, GUATEMALA

Ambassador Juan Jose Caso-Fanjul
Embassy of Guatemala
2220 R St. NW
Washington DC 20008

PLEASE SEND APPEALS IMMEDIATELY. Check with the Colorado office between 9:00 am and 6:00 pm, Mountain Time, weekdays only, if sending appeals after November 19, 1992.

APPENDIX C-25

Guatemalan Student Initiative, *Home Page*, www.alternativemedia.org/gsihome.html

Guatemalan Student Initiative

About The Guatemalan Student Initiative

The Student Movement in Guatemala is among the most persecuted sectors of the population, yet the students remain one of the strongest groups opposed to the military in Guatemala.

GSI is a project designed to provide contacts and support between U.S. and Guatemalan students and faculty at the university and high school levels.

Our goal is to use the video *No nos tientes (Don't Tempt Us: The Students of Guatemala)* to help educate U.S.A. and other international students about Guatemala and to encourage them to get involved in human rights projects for Guatemala.

ASPECTS OF THE GSI PROJECT

* Direct Internet contact with Guatemalan Students/Teachers
* Video about the Student Movement
* Sister Schools
* Guatemalan Student Speakers
* Delegations to Guatemala
* January Term Projects in Guatemala
* Letter Writing Campaigns

Students from Guatemala carry the remains of Abner Orellana a high school student gunned down for protesting the bus fare price hike. (Scene from the Video "No nos Tientes"©)

APPENDIX C-26

Guatemalan Student Initiative, *"About the Video No Nos Tientes! (Don't Tempt Us: The Students of Guatemala),"* www.alternativemedia.org/gsi3home.html

Guatemalan Student Initiative

ABOUT THE VIDEO

No nos tientes!
(Don't Tempt Us: The Students of Guatemala)

"A great achievement in documentary filmmaking" – ***La Raza, Chicago***

"North American Students would do well to see young teens whose participation in political strife is not merely fashionable" **Video Librarian** Jan/Feb 1996

No nos tientes is an award winning documentary on the Student Movement in Guatemala. It reveals the personal stories of struggle by high school and college students who represent the vanguard of social change.

Since 1954 when the CIA helped orchestrate the overthrow of the democratically elected government of Guatemala, the country has been plagued by right wing political violence. The military and paramilitary death squads have executed or disappeared more than 150,000 Guatemalans.

Thousands of teachers and students have been murdered or disappear. *No nos tientes* examines the social conditions which lead the students to risk their lives to combat this culture of fear and silence in Guatemala.

Narrated by **Edward James Olmos**
Directed by **Christine List**
Produced by **Amy Beer and Christine List**

50 minutes, 1995, Available in English or Spanish

HOW TO ORDER THE VIDEO:

(Includes STUDY GUIDE for high schools
and universities)
* Download the Study Guide From this page

Contact:

Alternative Media,

5950 West Erie, Chicago, IL 60644
USA

Tel. 312-261-2107

For Information on the Video or to get in touch with the Producer submit your E-mail Request to the address below.
GSI Coordinator

In the Memory of Oliverio Castañeda de León and the many unsung heroes of Guatemala.

Dr. Mario Larrave a dear professor who was killed for teaching that all men are created equal.

Contact Guatemalan Students Via E-Mail.

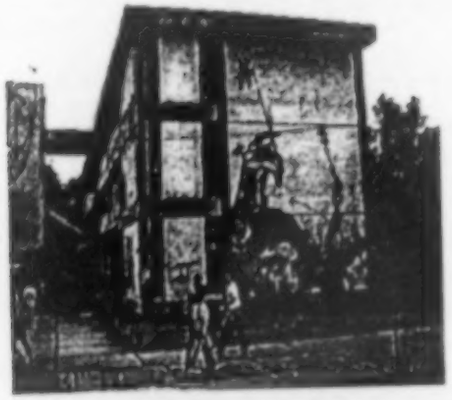
We would like to apologize to all the people who have sent messages to the above address and received no answer. Due to Guatemalan Government regulations the exchange of E-Mail with students could be seen or perceived as a threat to the Guatemalan National security. The Guatemalan telephone company has stated that they will monitor incoming and outgoing electronic mail. This has added further risk to the students and their cause for democracy. We will keep you informed of these developments and new ways to reach the students and show your support for their struggle.

Awards:

Audience Choice Award for Best Video,
Chicago Latino Film Festival, Bronze
Apple, Nation Educational Media Festival
Cine Eagle, CINE Foundation

Festivals and Screenings:

American Film Institute, L.A. Video Festival
United Nations Conference on Human Rights, Vienna Austria
Seattle Human Rights Festival
San Antonio Cine Festival
First Annual Festival of Latin American Video, Havana Cuba
Cine Festival Latino, San Francisco
Latin American Studies Association Conference
Union for Democratic Communications Conference



The University of San Carlos De Guatemala Campus.

Recommended for:

Universities/High Schools/Libraries

Latin American Studies
Peace Studies
Sociology
Psychology
Political Science
Multicultural Studies
Anthropology
International Studies

Topics Covered in the Video:

Attacks on students and teachers in Guatemala
The role of students in the 1993 coup
The psychology of torture by repressive regimes
How grassroots movements develop among students
Connections with broader social movements
Historic perspective of the war in Guatemala
How the students are creating a culture of liberation
The guerilla movement and the struggle for democracy

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APPENDIX C-27

Alternative Media, *"No Nos Tientes: (Don't Tempt Us) The Students of Guatemala" Teacher Manual*, www.alternativemedia.org/gsi_study%20guide.html

No Nos Tientes: (Don't Tempt Us) The Students of Guatemala

Teacher Manual

Alternative Media
2950 W. Erie Street
Chicago, IL 60644
(312) 261-2107

http://www.alternativemedia.org/

No Nos Tientes

No Nos Tientes: The Students of Guatemala, a video documentary, describes the role of the student movement in the Guatemalan struggle for human and civil rights. The documentary explains why movements of mass protest and armed struggle exist in Guatemala and shows how the student movement has served as a training ground for current grassroots political leaders.

Because of the crucial political role of the student movement, students have been targeted for death and torture with more frequency than perhaps any other opposition movement in the country. The video chronicles the repression against students and examines why students would choose to become involved in activities that could cost them their lives.

The purpose of this manual is to provide additional information that will help in discussion of the issues raised in

the video. The Guatemalan Student Initiative, a project linking U.S. and Guatemalan students, maintains a Web Site on the Internet that provides current information about student activities, the peace negotiations, and the 1995 elections.

Video running time: 52 minutes. Available with English or Spanish subtitles. To order, send check or money order to:

Alternative Media
5950 W. Erie Street
Chicago IL 60645
(312) 261-2107

Purchase Prices:
Universities and Colleges: $125
High Schools: $65
Community Organizations and Individuals: $20
(Call for rental prices.)
Please add $5.00 for shipping and handling.

For more information about the Student Initiative, visit the Web Site or write to:
Student Initiative Coordinator
Casa Guatemala
4554 N. Broadway Suite 273
Chicago, IL 60640.

This manual may be reproduced and distributed for educational purposes.

Guatemala is a country that bleeds. Massacres, kidnappings and displacement of people from their villages are extensive; 46,000 people have disappeared and are presumed dead.

Ninety percent of these victims of repression and violence are indigenous Maya Indians. Everybody knows where

the clandestine cemeteries are. Everyone knows who does the killing. And everybody knows it is done with impunity.

Rigoberta Menchu, 1992 Nobel Peace Prize Laureate.

Introduction

Guatemala is a country of more than 9 million citizens, over 60% of whom are indigenous Maya, Garifuna and Xinca. The country is rich in natural resources, but unequal land distribution and a lack of job opportunities means that more than 89% of the population lives in poverty, lacking the resources to adequately feed, house or clothe itself.

For over 30 years, a civil war has raged between the Guatemalan government and the National Guatemalan Revolutionary Unity (the "URNG"). With no respect for the rules of war or for international human rights, the Guatemalan security forces (military, police and paramilitary death squads) have killed and tortured hundreds of thousands of men, women and children, the vast majority unarmed civilians. In Guatemala, activism for any kind of social change can mean death, because of the chokehold maintained by the military over the civilian population. While the United States has often publicly denounced human rights violations in Guatemala, its policies have had the effect of insuring that the violence will continue.

As Rigoberta Menchu said at the time she won the Nobel Prize, peace in Guatemala is not only a matter of ending the war between the guerrillas and the army. That battle is not the problem: it is but is a symptom of the more

fundamental problems of poverty, discrimination, and the absence of rule of law and a free civil society.

Statistics on Guatemala

Poverty: Sixty-four percent of the urban population and 72% of the rural population of Guatemala live in poverty, with an annual per capita income of under $60. Only 33% of the population is considered "fully" employed. Many businesses do not pay taxes nor do the majority belong to the social security system, so workers generally receive no benefits such as health insurance, unemployment or disability insurance, or retirement pensions.

Health: At least one half of the population has no access whatsoever to health care. The national health care system covers only slightly more than 25% of the people. Only 20% of the country's doctors work in rural areas (60% of the population lives in rural areas). Over 80% of infants are malnourished, according to the World Health Organization, and as a consequence of malnutrition, 250,000 children under the age of 5 show some degree of mental retardation.

The Guatemalan government's statistics show that 24 babies out of 1,000 die before their first birthday and 100 out of 1,000 die before the age of 5. Only about 2 out of 10 births take place in a hospital.

Fewer than one-fifth of Guatemalan houses have running water or sewage systems. Approximately 90% of rural

water sources are polluted and unfit for human consumption. Guatemala has been in the throes of a cholera epidemic for several years as a result of lack of access to clean, safe drinking and cooking water.

Education: The government estimates that half of the population cannot read and write at all. Of the remaining half, one person out of two is functionally illiterate. In 1992, the Minister of Education estimated a shortage of 20,000 teachers. School is taught virtually completely in Spanish, a language many of the indigenous children do not speak or understand, and the curriculum is based on European culture and does not include any reference to indigenous culture or history.

Brief History of Guatemala

1. The Roots of Inequity

The crisis in Guatemala's economy and social situation results from three centuries of colonial rule, followed by almost 150 years of government by military dictatorship. At the time of the Spanish conquest in 1524, Guatemala's fertile land was mostly populated by the Maya Indians, who lived in the southern part of today's Mexico, and in Honduras, Belize and Guatemala. The Mayan way of life was primarily agrarian, although the Maya also achieved important advances in architecture and astronomy and other sciences. The land holds a central position in Mayan mythology and culture, and so agriculture was as much a cultural activity as a means of subsistence.

Under colonial rule, the Maya lost not only their means of subsistence but also elements of their historic culture and

way of life. The descendants of the conquistadores, people of mixed European and indigenous heritage known as "Ladinos," appropriated the land, carving it up into large plantations to grow cocoa and indigo for dye. During the colonial period, discrimination and repression of the indigenous people was institutionalized. While the Maya in what is now Guatemala were not exterminated as the native Americans in the United States, Mexico, and much of the rest of Central America were, they were enslaved and forced to work the plantations. Villages were controlled by Catholic priests, who attempted to convert the Maya, and by colonial officials, who required the indigenous people to wear special clothing to identify their place of origin and to restrict their freedom to travel.

In 1821, Guatemala became independent from Spain, as part of the Central American Region, but the Guatemalan land was immediately annexed to Mexico. Two years later, Guatemala broke away as part of the "United Provinces of Central America," a federation that lasted until 1839. Upon the dissolution of the union, Guatemala began to be ruled by the first of a series of military dictators.

The years of military dictatorship have left a legacy of unequal distribution of Guatemalas primary resource, land. Agriculture remains the countrys principal economic activity, with coffee and bananas replacing cocoa and indigo as the main crops. Over 85% of the land is held by large holders, many of whom have had close family ties to the military rulers. While the majority of landless Guatemalans work at least part of the year on the plantations, some farm small plots of their own, often unable to grow enough food to feed their families, and

increasing numbers are employed in factories mostly owned by foreign, multinational corporations.

The United States has played a large role in the economic and social development of Guatemala. In the early 20th century, the United Fruit Co., a U.S. exporter of bananas, was Guatemala's largest landowner. In 1904, in exchange for building a railroad across the country, United Fruit was granted thousands of acres along the fertile Atlantic coast; in 1936, Jorge Ubico, the first elected President of Guatemala, gave United Fruit more land along the Pacific coast, complete tax-exemption, including freedom from export duties, and a guarantee of low wages. By this time, United Fruit was Guatemalas largest landowner, employer and exporter.

II. Student Protests and the Development of a Movement for Human Rights

Since the beginning of the 20th century, university students have been at the vanguard of movements for social change. The first mass student protests were in 1920, but it was not until 1944 that the students were successful in leading a movement to bring down the government of the unpopular military dictator, Jorge Ubico. As part of a growing middle class of teachers, professionals and intellectuals who demanded greater political and economic freedom, the student movement was instrumental in bringing about the resignation of Ubico, who was notorious for his purge of leftists and suppression of trade unionists.

In June 1944, a student strike, demanding university autonomy from government control, mushroomed into a

general strike in Guatemala City, after the government denied the students' demands, suspended constitutional guarantees, and fired on anti-government demonstrators, killing one. Ubico was forced to resign within one week. A military junta took over the government, replacing Ubico with Emilio Ponce as President.

When it became apparent that Ponce had no intention of holding elections, armed students and workers joined dissident military officers to oust Ponce. An interim junta, headed by two army officers and a civilian, held congressional and presidential elections, and on March 15, 1945, Juan Jose Arevalo became president. Modeled in many ways after the Roosevelt New Deal, President Arevalo's government was committed to democratic values, emphasizing improvement of education and literacy rates and protection of the rights of workers.

President Jacobo Arbenz, Arevalo's successor in 1951, continued the reforms, including an agrarian reform law to redistribute idle, uncultivated acreage from large landholders to farmers. The land reform law increased productivity; more importantly, small farmers were able to provide themselves with food and even a small amount of cash from sales, and they became involved in the Guatemalan political system for the first time in 400 years.

III. Backlash and Increased Repression

The United States planned and ordered the overthrow of Guatemalas first and only reformist government.

Arbenz's agrarian reform plan was bitterly opposed by the shareholders of United Fruit Company, who challenged the government's valuation of their land, although the valuation was that used on tax returns filed by the company itself. United Fruit shareholders were supported by U.S. Secretary of State John Foster Dulles and his brother CIA director Allen Dulles, who both had business ties to United Fruit before entering the government. The U.S. government initiated a destabilization campaign, accusing Arbenz of being a Soviet sympathizer, and finally assisting "Liberation Forces" to enter Guatemala, on the pretext that U.S. intervention was necessary to stop the spread of communism. Arbenz was forced to resign and was replaced by Colonel Carlos Castillo Annas, the chosen favorite of the U.S. government.

The U.S.-instigated overthrow of the Arbenz government began a new era of repressive military rule, during which the government declared war on members of the reform movement and on the indigenous population. The reforms of the previous ten years, including land reform, social security and workers' rights, were dismantled. An extensive apparatus of repression was developed, including a vast network of secret detention centers, chambers of torture, and clandestine cemeteries; and a security and surveillance system based on the Israeli model. The intelligence police, known as the "G-2" was organized, and the military and other security forces began to operate

secret forces, called death squads, who abduct or assassinate victims at any hour of the day or night, in their homes, on their way to school, to work, to church, or anywhere in the country. In addition to assassination or abduction, suspected opponents of the government were frequently harassed by anonymous death threats delivered by telephone or in person, or even published, signed by right-wing, government-sponsored groups. The death threats were used to create a climate of fear to discourage people from joining opposition groups and to paralyze the groups themselves.

The increasing repression led the national university, the University of San Carlos (USAC) as an institution, to become active in political struggles for the first time in the early 1960's. In 1962, allegations of fraud in Congressional elections led to mass protests, where large numbers of secondary school students joined the university students. Government security forces invaded the university's School of Law. The university issued a formal protest and eventually demanded the resignation of President Miguel Ydigoras Fuentes after the murder of three students by the military police on the day of the annual student Strike of Sorrows ("Huelga de Dolores"), a parade to commemorate the deaths of students and to protest against government violence and repression.

Opposition to widespread corruption in President Ydigoras' government led to the formation of the first armed opposition, or guerrilla, movement, by a group of reformist military officers. Although the guerrillas never numbered more than 500 during the 1960's, they provided a convenient rationale for the killing of hundreds

of thousands of civilians, on the pretext that they were, or supported, the guerrillas.

While there were students who fought with the guerrillas, many did not, but the government-sponsored violence against the university community continued: students were murdered and kidnapped; various university buildings were shot at by land and by helicopter. The situation became serious enough that the Guatemalan president demanded a meeting with the rector and docents of the university, during which the President accused the university of being the head of the guerrilla movement.

By 1970, when General Carlos Arana Osorio took office as president, the armed opposition movement had been decimated by the military. During the 1970's, alongside of a growing civilian movement for change, the guerrillas emphasized popular education and political training of the indigenous population. The 1970's saw the growth of peasant and labor unions, which enlisted increasing numbers of members to organize to fight peacefully against government repression. The misery of urban Guatemalans was exacerbated severely by the 1976 earthquake, which killed 25,000 people and left 1.25 million homeless, exacerbating the poverty and hunger of the urban population.

As the popular movements began to organize and the armed opposition movement regained its strength, the government responded with the most violent wave of repression so far. In 1978, Dr. Mario Lopes Larrave, ex-Dean of the USAC law school, was machine-gunned to

death. In the same month, student leaders Robin Garcia and Anibal Leonel Caballeros were also executed.

By the late 1970's the guerrilla organizations had formed four separate organizations. By 1980, there were 5,600 armed combatants. In 1982, the four separate organizations that had developed merged to form the Guatemalan National Revolutionary Unity (the "URNG"), which serves as the diplomatic and military command of the armed revolutionary movement.

In 1980, General Romeo Lucas Garcia was appointed president. As had his predecessors, Lucas Garcia targeted the University of San Carlos. The military also tortured and killed hundreds of union members and leaders, Mayan clergy, and community organizers. Thirty-nine people, including several university students, were killed when the government ordered the police to attack the Embassy of Spain, where farmworkers from the Northern highlands had gathered to publicly read a list of grievances on behalf of victims of the growing repression. Ignoring the Embassy's sovereign immunity, the police burned the building, leaving just two survivors, the Spanish Ambassador and one of the farmworkers. The farmworker, Gregorio Yuja Xona, was abducted from his hospital bed on the night of the attack; his tortured body was found the next morning at the national University of San Carlos. Spain broke off diplomatic relations with Guatemala, but both the U.S. and Guatemalan governments dismissed the incident, calling the victims (who included the ex-Vice President of Guatemala), members of a radical student organization. In 1981 and 1983 the rectors (presidents) of the university were killed; another fled into exile, in fear for his life. Another 36 students and

10 teachers were killed or "disappeared" in 1984 and 1985 alone.

From 1982 to 1985, each president of Guatemala was displaced by a military coup. During the presidency of General Efrain Rios Montt, an Evangelical Christian who believed that his actions were divinely inspired, the bloodiest yet campaign was waged to destroy the growing armed and civilian opposition movement. Indigenous communities and villages in the northernmost provinces of Guatemala were subject to a policy of "scorched-earth." Saying that these people were supporting the guerrillas by providing them with food, the military tortured and killed thousands of civilians, including children, and burned over 400 villages to the ground to eradicate any hope of survival. An exodus of hundreds of thousands of Maya fled across the border to Mexico. Some were placed into international refugee camps, which the Guatemalan security forces infiltrated and even bombed. Other communities vanished into the dense jungle areas, setting up mobile villages that could be dismantled at a moment's notice. These communities became known as the "Communities of Population in Resistance;" their existence was virtually secret until the early 1990's when representatives of the groups began to come to the capital to participate in the popular movement.

In the early 1980's the government began to institutionalize growing numbers of the indigenous civilian population in "model villages." These villages were re-education camps: inmates were forced to abandon their traditional culture, to grow crops for export rather than for subsistence, and all males over 13 were required to serve in

paramilitary units supervised by the army called civil patrols. Civil patrollers were, and continue to be, forced to work on construction projects for the army, with no pay and with no compensation from time lost from their own labor; they are used as cannon fodder for the army, that is, civil patrollers are sent out first in case of suspected guerrilla attack so they will receive the brunt of the attack. Refusal to serve on a civil patrol can mean death for the refuser and, in many cases, for his family as well.

The army also stepped up forced recruitment into the regular forces during this period. The Guatemalan Constitution forbids the army to recruit males under the age of 16, but it remains common practice for trucks to round up all young males in a certain vicinity and force their induction into the army. The consequence of desertion can be torture or death.

Elections were finally held in 1985, and Vinicio Cerezo was inaugurated as president in January of 1986. While there was an immediate reduction in killings, disappearances and torture by the military in the first months of his term, Cerezo indicated his government would not seek out and punish those members of the military that were responsible for killing or torturing civilians who acted for greater freedom and rights. During Cerezos term, the state-sponsored violence continued.

President Serrano, elected in 1991 in the first peaceful transition of power since 1951, sought and obtained office with the promise that he would end Guatemala's tragic record of human rights abuses, as well as the impunity of human fights violators. The reality was that the military

continued to effectively hold the reins of power and gross human rights abuses continued as a matter of course. In the first three months of Serrano's presidency alone, human rights monitors estimated that there were 180 extrajudicial murders and 46 disappearances.

In 1991 and 1992, repression against the USAC community in particular greatly intensified. In January of 1992, the Association of University Students office at USAC was bombed. In April of 1992, a new combined force of police and military, known as the "Hunapu" regiment, fired on a group of students preparing for the annual student march, the "Huelga de Dolores" ("Strike of Sorrows"), permanently injuring several; in May Hunapu members entered the University campus, firing upon students and abducting several.

IV. The 1993 Coup

Violence and repression against students, faculty, trade unionists, farmworkers and other members of the civilian population continued throughout Serrano's term. At the same time, the government imposed a series of "austerity measures" such as electricity and transportation rate increases and the issuance of required identity cards for students, which the government decreed would entitle students to transportation at reduced rates, although the private bus companies refused to honor the passes. The austerity measures were widely opposed, the students in particular decrying the transportation increases and the issuance of identity cards. Small spontaneous protests took place in various parts of the country. By late May, the situation had reached crisis proportions as state

workers called for a general strike on May 21 to oppose the electricity rate increases and the imposition of school uniforms, which many students could not afford, and identity cards. In the capital, particularly, the unrest gave the military the impression the country had become ungovernable.

In addition, in the months before the attempted coup, events such as a mass return of refugees from Mexico, the increased visibility of the internally displaced Communities of Population in Resistance (CPR'S), and the award of the Nobel Peace Prize to Rigoberta Menchu, focused international attention on human rights in Guatemala and bolstered the Guatemalan social justice movement. In addition, the national press reported these and related political developments with a tone that was sharply critical of the army and government.

On May 25, 1993, fearing that he had lost control because of the increasing number of student-led protests, President Serrano, with the backing of the Guatemalan military, announced that he had suspended the constitution and would rule by decree. Facing a prompt and forceful international response and a broad-based coalition of domestic opposition, the military refused to support Serrano, instead forcing him to resign. Both Serranos vice president and the military candidate for president were popularly unacceptable. Hoping to appease the civil unrest, the legislature appointed Ramiro de Leon Carpio, the government's "Ombudsman for Human Rights," as President.

V. 1993 to Present – Unfulfilled Hopes

As Ombudsman for Human Rights, De Leon Carpio had initiated the investigation of human rights abuses committed by the military. His appointment as President raised hopes for fundamental changes in the extent of power and political decision-making by the army. These hopes have not been fulfilled.

The De Leon Carpio government has not produced any fundamental changes with respect to the power of the army. De Leon has refused to abolish the civil patrols, although as Ombudsman for Human Rights he denounced the existence of the patrols. There has been an increase in common crime, such as drug trafficking, kidnapping and car thefts, and an increase in indiscriminate terrorism and child kidnappings. The student community has continued to be targeted. For instance, in 1994, students were forbidden to meet in groups of larger than two. In November of 1994, peaceful student protests against a 55% transportation rate increase led to violence as the police invaded the University of San Carlos campus, firing on the students and killing Mario Lopez Sanchez, an undergraduate student. In January 1995, the current Human Rights Ombudsman denounced that the lack of security for the population constitutes a state of anarchy, insecurity and terror.

Elections were held in November of 1995. For the first time, two candidates representing the popular movement ran for Congress.

VI. The Process of Negotiating for Peace

The URNG has been engaged in peace negotiations with the Guatemalan government since 1990. A representative of the General Secretariat of the United Nations participates in the negotiations. Long stalled over the issues of human rights, land reform and refugee resettlement, an agreement was finally signed in January 1994 establishing the order of substantial points to be discussed and agreeing to the formation of an "Assembly of Civil Society" to include representatives from the civilian population in the peace talks. In March of 1994, an agreement on human rights was reached. Over the next year, agreements on Indigenous Rights and Refugee Resettlement were also signed; the latter agreements will not go into effect until all the issues on the negotiating table have been agreed to.

The 1994 "Comprehensive Accord on Human Rights" was to go into effect immediately, with independent verification from a United Nations mission. Unfortunately, the members of the mission have been harassed and intimidated by forces controlled by the government; in June of 1995, two members were held hostage for 26 hours.

VII. The U.S. Role Since 1954

While the U.S. State Department has publicly condemned Guatemalas persistent practice of abuse of human rights, U.S. policy has been instrumental in creating and maintaining the power and impunity of the military forces. The United States has supported the activities of the Guatemalan government both by giving direct financial aid and by training and advising the military. In addition,

since the U.S. sponsored coup in 1954, the CIA has worked closely with the Guatemalan security forces.

In the 1960s, the United States used Guatemala as a staging ground for its war on communism. During this period, U.S. taxpayers provided critical support and training to the Guatemalan military, including the G-2, the secret police, which was advised, trained, armed and equipped by U.S. undercover agents. The scorched earth tactics of the early 1980s were modeled on U.S. operations in Vietnam, and U.S. military officers were instrumental in organizing the death squads that terrorized the Guatemalan population.

In 1995, it became public that the Guatemalan Army colonel who ordered the murders of Efrain Bamaca, a guerrilla commander and the husband of U.S. citizen Jennifer Harbury, and Michael Devine, a U.S. Citizen living in Guatemala, was on the CIA payroll for numerous years. According to U.S. and Guatemalan intelligence sources, at least three of the recent chiefs of the G-2, the intelligence police, have been paid by the CIA, as was Hector Gramajo, Minister of Defense under Rios Montt and manager of the scorched earth campaign.

Overt financial aid to the Guatemalan military was cut off in 1977 by Carter administration, because of Guatemalas consistent violations of human rights. The U.S. continued to donate military equipment and weaponry and to train Guatemalan army and police officers, including Hector Gramajo, who attended the U.S. School of the Americas in Georgia for counterinsurgency training.

The Reagan administration consistently de-emphasized the number and severity of human rights abuses by the

Guatemalan security forces in the annual State Department country reports, upon which many foreign aid and foreign policy decisions are based. Despite U.S. legislation prohibiting export licensing of sales of military equipment to governments "engaged in a pattern of gross violations of internationally recognized human rights," the Reagan administration approved licenses of sales to Guatemala of over $1.4 million worth of equipment during the height of Rios Montt's scorched earth policy.

When Cerezo became president of Guatemala, his policy of neutrality toward the Nicaraguan contras infuriated the Reagan administration, which actively supported the contras even after being forbidden to do so by Congress. During this period, the Democrat-controlled U.S. Congress actually approved greater levels of military assistance than requested by the administration.

The Bush administration publicly criticized the Guatemalan government for its violations of human rights but continued to provide economic assistance and U.S. military personnel, ostensibly to assist in municipal construction and health projects, continued, as did the training of Guatemalan military officers in the United States.

In 1993, military aid was expressly conditioned on improvement in human rights. The new legislation specified that before releasing aid, the relevant Congressional committees were to evaluate the Guatemalan government's progress in investigating and bringing to justice certain notable cases of human rights violations. Military assistance has not been reinstituted. In 1995, however, military training was suspended after it became public that a Guatemalan colonel who was being paid by the

CIA ordered the murders of Michael DeVine, and the husband of Jennifer Harbury.

The United States also supports Guatemala through the Generalized System of Preferences ("GSP"), legislation that seeks to promote trade with developing countries by granting most of their products duty-free access to the U.S. market. Beneficiaries of the GSP, however, must respect internationally-recognized workers' rights and intellectually property laws. Petitions brought to the committee in charge of reviewing GSP status have succeeded in placing Guatemala's status under review, but GSP benefits have not been revoked despite overwhelming evidence that Guatemala does not respect the right to form and participate in trade unions.

Guatemalan Refugees in the United States

Tens of thousands of Guatemalans have fled to the United States seeking refuge from the violence in Guatemala. International and U.S. domestic law provide that a person may seek political asylum if he or she is unwilling or unable to return to his or her home country because of persecution, or a well-founded fear of persecution, on account of race, religion, nationality, political opinion, or membership in a particular social group. From June of 1981 until March of 1991, the U.S. government approved only 2% of the Guatemalan applications for political asylum, compared, for example, to a 72% approval rate of applicants from the Soviet Union or a 90% approval rate for Cubans.

In 1990, the U.S. government settled a lawsuit brought on behalf of Guatemalan refugees, *American Baptist Churches*

v. Thornburgh ("ABC"), which charged the government of discriminating against Guatemalans on the basis of foreign policy considerations. Guatemalan applicants were given a chance to apply and to have their applications reviewed by specially trained asylum officers. This case, however, did not solve the problem of many refugees, because they are fleeing from general conditions of political violence, civil war, and human rights violations. The United States has refused to grant Guatemalans Temporary Protected Status, which would suspend deportations to Guatemala, although this status has been granted to other nationalities during civil wars in their home countries.

Video Study Questions

1. What are the conditions in Guatemalan schools that prompted students to organize as a political movement? Compare the conditions in your school, and your life as a student, to the experience shown in the video.

2. What major social problems concern the students? Do any of these problems explain why Guatemala has been in a civil war for 30 years

3. What risks do young people face by being involved in the student movement? Why do they take these risks?

4. How does the student movement fit into the broader popular movement for social change?

5. What methods are used by the Guatemalan government and military to control students? Why do the government and the military accuse the students of being communists and subversives?

6. What is the attitude of teachers and human rights activists toward the student movement?

7. How is the United States involved in Guatemala? Does U.S. involvement make the situation better or worse? What are some activities U.S. students can pursue to support the student movement and social change in Guatemala? (See The Next Step in this manual for suggestions.)

Classroom Activities

Feast and Famine Banquet

One fundamental tenet of human rights is that all individuals must have equal access to basic, life-sustaining resources. In Guatemala, almost 90% of the people do not have access to adequate food and drinkable water, while the other 10% have more than they need. This inequity is one of the major causes of rebellion in Guatemala.

To understand the social implications of this inequity, the class can arrange a banquet during the class period. Each student should bring one delicious snack and one cracker. The teacher will collect all the snacks and the crackers and divide the class into sections representing a population that is 90% poor and 10% wealthy: for each nine poor students, one will be wealthy. Each of the poor students will have one cracker for a snack, and the rest of the food will be for the rich students, who should be instructed not to share with the rest of the class.

Questions for students:

1. How does it feel to not have enough food when others have too much?

2. Could you accept this situation on a daily basis?

3. What conflicts would arise out of this situation?

4. How could you remedy the situation?

5. What connections are there between this banquet and the situation in Guatemala?

Internet Project

Students can use the Internet to find out more about current affairs in Guatemala. Most schools have access to the Internet though libraries and students may have access through their home computers. We suggest that teachers arrange to have a librarian or computer science teacher give a short talk on use of the Internet.

The page is linked to the major human rights organizations that report on Guatemala on a regular basis. As a class assignment, students can be divided into groups to find answers to the following questions:

1. What are the current objectives of the Guatemala student movement? What actions are planned to reach those objectives?

2. From the GSI Home Page, click on to one of the related pages, such as the Jeniffer Harbury Home Page. What accusations is Ms. Harbury making against the United States government and the CIA?

The Next Step

WEB PAGE

You can instantly access information about Guatemala and the student movement on the Guatemala Student Intitiative (GSI) web page at: **http://www.alternativemedia.org/gsihome.html.**

At the web page, you can send E-Mail directly to students and faculty in Guatemala who are eagerly awaiting to hear from you.

BRING A SPEAKER TO YOUR SCHOOL OR CAMPUS

GSI can help you bring a speaker to your school or campus. Speakers from Guatemala frequently tour in the United States, or GSI can help you connect with a representative of a Guatemalan refugee organization in your community.

BECOME A SISTER SCHOOL

Students and teachers can start a sister school organization with as few as two or three core members. GSI can put your group in contact with a student organization in Guatemala and suggest solidarity activities.

DELEGATIONS TO GUATEMALA

GSI encourages students and teachers to participate in fact-finding delegations to Guatemala. Delegates spend one week in Guatemala interviewing students, teachers, human rights workers, farmworkers and trade unionists

to find out more about the current situation in Guatemala. The results of interviews are compiled into a report for U.S. government and United Nations officials. GSI can help you organize a delegation and will forward reports to appropriate officials.

JANUARY TERM IN GUATEMALA

Students and teachers who wish to spend a January term in Guatemala can contact GSI for help in finding low-cost housing, educational opportunities, and contacts in Guatemala. January courses can be arranged on a number of topics including Human Rights, Mayan Culture, Environmental Issues and Urban Struggles.

WRITE A LETTER

Organize a campaign to write letters to your U.S. Senators and Member of Congress asking for an end to military aid and CIA involvement in Guatemala. Ask the government to make public documents about CIA activities in Guatemala so that the truth will be known about U.S. aid to death squads and terror. Send your letters to:

The Honorable
United States Senate
Washington, D.C. 20510

and

The Honorable _____
United States House of Representatives
Washington, D.C. 20510.

Resources

Amnesty International
304 Pennsylvania Ave. SE
Washington, DC 20003
(202) 544-0200.
International human rights monitoring and activism group. Has local chapters in virtually every city in the United States. Also has a student network in high schools and colleges.

Atanasio Tzul, Guatemala Support Network
4554 N. Broadway Suite 273
Chicago, IL 60640
National network of solidarity organizations in support of the struggle for human rights in Guatemala.

National Coordinating Office of Refugees and Displaced of Guatemala (NCOORD)
59 E. Van Buren
Suite 1400
Chicago, IL 60605
312-360-1705.
Clearinghouse for information about and coordinator for support for Guatemalan refugees returning from Mexico. Arranges accompaniment trips.

Washington Office on Latin America
110 Maryland Ave. NE
Washington, DC 20022
202-544-8045.
Reports to US Congress on developments in Central America.

Print Resources

Barry, Tom. *Guatemala: A Country Guide.* Albuquerque: The Resource Center (1990).

Barry, Tom. *Inside Guatemala.* Albuquerque: The Resource Center (1991).

Jonas, Suzanne. *The Battle for Guatemala*: Rebels, Death Squads and U.S. Power. Boulder: Westview Press (1991).

Schlesinger, Stephen, and Stephen Kinzer. "Bitter Fruit". New York: Doubleday and Anchor Books (1983).

Simon, Jean-Marie. *Guatemala: Eternal Spring, Eternal Tyranny.* New York: W.W. Norton & Co. (1987).

The Guatemala Student Initiative

The Guatemala Student Initiative (GSI) is a project to provide contacts and support between U.S. and Guatemalan students and teachers. The greatest impact of the GSI will be on the lives of students and teachers in Guatemala and the United States. Our goal is to use ***No Nos Tientes*** as a rallying point to develop sister school links between activist groups in Guatemalan schools and U.S. students and teachers.

U.S. students and faculty can maintain constant communication via mail, phone, fax and e-mail with student and faculty contacts in Guatemala. U.S. schools are encouraged to organize delegations to Guatemalan schools, to set up exchanges and presentations, and to offer interim semester courses on human rights in Guatemala. In addition, we are setting up a network which will link all of the participating groups through a Web Site on the Internet to mobilize U.S. students on a national level.

These activities will help protect the lives of Guatemalan students and faculty by drawing international attention to Guatemala. The Student Initiative will benefit members of the entire Popular Movement in Guatemala, since the students tend to be at the vanguard of opposition efforts.

U.S. students also benefit. They become more intimately involved and knowledgeable of the situation in Guatemala and of the U.S. role in the Central American region. An indirect social benefit of the project will be to sensitive youth to the plight of political refugees, hopefully stemming the tide of anti-immigration sentiment which is currently gripping our country.

No Nos Tientes: The Students of Guatemala was produced by Amy Beer and Christine List in cooperation with Casa Guatemala, a Chicago-based non-profit organization. The Guatemala Student Initiative is a project of Casa Guatemala. Funds for the Student Initiative and this manual were contributed by the Funding Exchange and the Crossroads Foundation. All profits from sales of the video, are donated to the Student Initiative.

APPENDIX C-28

"Ceiling on Transit Fares Removed", *Jennifer Harbury Letters & Information*, www-personal.engin.umich.ed ...ury/archive/cerigua/cwb06_98b.html

Ceiling on Transit Fares Removed

Guatemala City, February 5. Guatemala City mayor, Oscar Berger, announced January 29 that he will allow increases to city transit fares, as part of a thorough overhaul of the system. The announcement has revived memories of past attempts to raise the fare, which have usually led to widespread and violent protests by passengers.

The mayor announced the new policy, which puts an end to decades of municipal regulation of fares, saying that starting in June the market will control transit prices. To ensure that the poorest users are not hurt, however, Berger says the municipality will provide cheaper bus tickets for them. And he said that should the bus owners abuse the new system, the municipality would reserve the right to step in and take over all the routes.

The change will take place once the city's 101 bus routes are redistributed through a bidding process among the 20 private companies that are now operating and any newcomers that fit the requirements. In addition, the city government will divvy out to the companies 800 new busses bought last year with a US $60 million loan from the Central American Economic Integration Bank (BCIE).

Bus owners receive US $8 million annually in government subsidies for providing the service.

The Unity of Labor and Popular Action (UASP), the Guatemalan Workers Union Federation (UNSITRAGUA) and the University Students Association (AEU) have all condemned the move, calling it another blow to already strapped family economies.

For many Guatemalans, affordable city transportation is an essential service that they are willing to fight to defend. In 1994 following a 25 centavo hike in the fare, protests broke out across the city. During one, police shot and killed university student Mario Alioto Sanchez Lopez.

Critics dispute the government's argument that competition will keep prices low since the city's bus owners have never in the past troubled to improve the service to attract passengers.

In fact, Guatemala City's busses are widely seen as a public hazard. Despite the government subsidies they receive, bus owners do not maintain their units and are not obliged to meet any safety, health or environmental standards.

Just last week, three passengers fell from an overcrowded bus when the driver braked suddenly. Two of the victims were killed when they hit the pavement and the third received serious injuries. The bus's driver did not stop to attend to the victims, but continued on his route.

APPENDIX C-29

"Transit System Reform, a Mixed Blessing", *Jennifer Harbury Letters & Information*, www-personal.engin.umich.ed...ury/archive/cerigua/cwb26_98.html

Transit System Reform, a Mixed Blessing

Guatemala City, July 2. The lungs of Guatemala City residents may finally find some relief, and trips to and from work in the city may not be so fraught with danger. But these changes – the result of reforms to the transit system – will also affect city dwellers' wallets.

In an attempt to renovate the capital's appalling transit system, yesterday Mayor Oscar Berger put 800 new busses into service and banned the oldest of the units in circulation from the city's streets.

The move, paid for with a US $60 million loan from the Central American Economic Integration Bank (BCIE), seeks to attack the worst of the problems created by the privately owned service by taking more than 700 units built before 1978 off the road, redesigning several routes in order to alleviate the city's center, and legislating penalties for drivers and bus companies that violate transit regulations.

Guatemala City's bus owners have traditionally kept their units – some of them with more than 40 years in circulation – in a permanent state of disrepair, endangering the lives of passengers, and polluting the city air. They also overload the busses, leaving riders dangling from the back doors, and causing many accidents. And they encourage their drivers to race each other for fares, with little regard for other vehicles or passenger safety.

But attempts to improve the system have to date ended in failure. The 20 bus companies, who receive a government subsidy for providing the service, form a powerful lobby group that not even the ruling National Advancement Party (PAN) is eager to defy. Now, with general elections looming up next year, Berger – a favorite to run as the PAN's presidential candidate – has once again taken up the challenge, with mixed results.

Not all users are happy with the changes. Travelers on the new busses must pay ten to 35 centavos more. And many older units have slipped in a fare hike as well. For poverty stricken Guatemalans, even pennies more per trip is devastating to the family economy. In addition, the municipality reduced the length of many routes, forcing passengers in outlying districts to take more than one bus, and pay two fares.

Often in the past, increases in transit fares have led to widespread rioting. So far under the new system disturbances have been few.

APPENDIX C-30

"Crisis in Public Transit, an Annual Event", *Jennifer Harbury Letters & Information*, www-personal. engin.umich.ed...ury/archive/cerigua/cwb02_97.html

Crisis in Public Transit, an Annual Event

Guatemala City, January 3. Every year, Guatemala City bus companies pull their units from the streets to press

City Hall to authorize higher fares for the public service. The ensuing chaos has often resulted in the deaths of transit users. But now, city Mayor Oscar Berger says he has a plan to resolve the problem once and for all.

Only months after the municipal government approved a five centavo hike in public transit fares, the privately owned companies, which provide the service in exchange for a US $8 million annual government subsidy and any profits to be had, demanded this month another 18 centavo – or 25 percent – increase in fares. When City Hall refused, the companies suspended the service December 15. And for two weeks city residents had to rely on a motley assortment of vehicles – which appeared overnight to offer their services in place of the busses – to get them to and from work.

Finally the companies accepted Mayor Berger's offer of another five centavo hike, and service was resumed.

Two years ago, a similar strike by the bus companies led to widespread rioting. One university student was killed by police during a protest, and several people died in falls from the vehicles that provided an improvised service. On that occasion the municipal government promised a city-owned service that would compete at a lower price with the other companies. The city service – comprised of 20 units – lasted less than a year and only reappeared temporarily to help alleviate the renewed crisis this year.

Now Mayor Berger says that a new fleet of 800 city-owned buses is the solution. The municipality has presented a bill to Congress to approve the US $60 million

loan from the Central American Bank for Economic Integration (BCIE) that is needed to purchase the vehicles.

APPENDIX C-31

"Cost of Living Protests Begin,", *Jennifer Harbury Letters & Information*, www-personal.engin.umich.ed...ury/archive/cerigua/cwb09_97.html

Cost of Living Protests Begin

Guatemala City, February 26. Long-predicted protests against rising living costs in Guatemala began to erupt this week with lively demonstrations in the capital and Chichicastenango, Quiche province.

On the outskirts of Chichicastenango, thousands of campesinos set up burning barricades and stoned buses to protest higher transit fares and increased costs for basic goods and services.

Protesters said interurban bus fares have gone up more than 50 percent in recent months.

Several buses and a police patrol car were attacked with stones and clubs when they tried to run the barricades.

And today in the capital, several hundred demonstrators showed up at Congress to protest government economic policies. The protesters attempted to enter the building to attend the congressional hearing of Economy Minister Mauricio Wurmser, but more than a hundred riot police blocked their passage.

After the intervention of legislators from the New Guatemala Democratic Front (FDNG), however, the security forces allowed protesters to enter.

Inside Congress, Wurmser defended his policies saying the measures have curbed inflation and stabilized fuel prices. The minister rejected charges that the cost of basic goods have registered a sharp increase this year.

But FDNG legislator Nineth Montenegro said the government's economic policies have resulted in increased hardship and unemployment for the average Guatemalan. Almost half the work force is now unemployed, she noted.

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(9)

Supreme Court, U.S.
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Supreme Court of the United States

OCTOBER TERM, 1998

IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

v.

JUAN ANIBAL AGUIRRE-AGUIRRE,

Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICUS

This *amicus curiae* brief is submitted by the Office of the United Nations High Commissioner for Refugees with the consent of the parties.[1]

The Office of the United Nations High Commissioner for Refugees (UNHCR) has been charged by the United Nations General Assembly with responsibility for providing international protection to refugees and other persons within its mandate and for seeking durable solutions to the problems of refugees by assisting governments and private organizations. *See* Statute of UNHCR, U.N. Doc. A/RES/428(V), Annex, ¶¶ 1, 6 (1950). As set forth in its enabling statute, UNHCR fulfills its protection mandate by, *inter alia*, "[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto." *Id.* ¶ 8(a). UNHCR's supervisory responsibility was formally recognized in the Protocol relating to the Status of Refugees, art. 2, 19 U.S.T. 6223 (1967) ("Protocol"), which the United States ratified in 1968.

The views of UNHCR are informed by almost 50 years of experience supervising the Protocol and the Convention relating to the Status of Refugees, 19 U.S.T. 6259 (1951) ("Convention"). UNHCR is represented in 118 countries. UNHCR provides guidance in connection with the establishment and implementation of national procedures for refugee status determinations, and also conducts such determinations under its mandate. UNHCR's interpretation of the provisions of the Convention and Protocol are, therefore, integral to the global regime for the protection of refugees.

The present case concerns the interpretation of the "serious non-political crime" exclusion contained in Article 1F(b) of the Convention and incorporated by reference into the Protocol. The

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[1] Pursuant to Rule 37(6) of the Rules of the Supreme Court, *amicus curiae* states that no counsel for a party has authored any part of this brief, and no person or entity, other than the *amicus curiae*, its members, or its counsel, made any monetary contribution to the preparation or submission of this brief.

exclusion clauses in Article 1F form part of the refugee definition and help to maintain the integrity of the institution of asylum by ensuring that the protective principles of the Convention are not exploited by persons who, by reason of their having committed particularly grave acts, are undeserving of international protection. At the same time, UNHCR has a strong interest in ensuring that those clauses are applied in a manner that comports with the humanitarian purposes of the international refugee protection regime.

Resolution of this case is likely to affect not only the interpretation by the United States of the provisions of the Convention relating to who is and who is not entitled to the internationally protected status of refugee, but also the manner in which other countries interpret those provisions. UNHCR, therefore, has a direct interest in ensuring that this Court's ruling is consistent with its own interpretation of the Convention.[2]

SUMMARY OF ARGUMENT

When enacting the Refugee Act of 1980, Congress made clear its intention to bring U.S. refugee law into conformity with the provisions of the Protocol and its understanding that the exclusions in that Act would be construed consistent with the Protocol. The core purpose of both the Refugee Act and the Protocol was to safeguard the rights of persons subject to persecution in their homelands. In view of this humanitarian purpose and the serious consequences of exclusion for the person concerned, Article 1F must be restrictively construed.

The specific purpose of Article 1F(b) was to distinguish persons regarded as *bona fide* refugees deserving of international protection from serious common criminals unworthy of such protection. In order to make this distinction, it is essential that the totality of circumstances surrounding an applicant's case be evaluated in determining whether the crime of which he is

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2 Consistent with its usual practice UNHCR submits this *amicus curiae* brief in order to explain the analytic framework for resolving issues of inclusion and exclusion under the Convention and not to offer an opinion on the merits of the applicant's claim.

suspected is "serious" within the meaning of Article 1F(b). This evaluation requires consideration of the nature of the offense, the punishment that may be imposed, and any mitigating or aggravating circumstances. A balance must be struck between the offense and the likelihood and severity of the persecution feared. An applicant is excludable only when such a balancing supports the conclusion that he is, in reality, a fugitive from justice or that his criminal character outweighs his character as a *bona fide* refugee.

Because Article 1F(b) creates an absolute bar, construing that article in a manner that prevents consideration of the totality of circumstances would deny States the right to recognize the status of persons they believe to be refugees deserving of international protection. Such a construction is inconsistent with the humanitarian purposes of the Convention.

In order for a crime to be classified as "political" for purposes of Article 1F(b), it must: (1) have a genuine political motive; (2) be causally related to its political objective; and (3) not involve means that are out of proportion to its political objective or are otherwise atrocious in nature. Determining whether an offense that is not atrocious in nature is proportionate to its political objectives requires consideration of the context and the totality of the surrounding circumstances.

ARGUMENT

I. THE HUMANITARIAN PURPOSES OF BOTH THE REFUGEE ACT AND THE PROTOCOL DICTATE THAT THE SERIOUS NON-POLITICAL CRIME EXCLUSION BE CONSTRUED RESTRICTIVELY.

When enacting the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) ("Refugee Act"), Congress made explicit its intention to "bring United States law into conformity with the internationally-accepted definition of the term 'refugee' set forth in the . . . Convention and Protocol." H.R. Rep. No. 96-608, at 9 (1979). Looking to "the new definition of 'refugee,' and indeed the entire 1980 Act," this Court recognized in *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), that "[i]f one thing is clear from the legislative history . . . it is that one of Congress' primary purposes

was to bring United States refugee law into conformance with the . . . Protocol." *Id.* at 436-37; *accord Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 169 (1993).

As with the definition of "refugee" itself, Congress specifically expressed its intention that the provision of the Refugee Act obligating the Attorney General to withhold deportation of a refugee, 8 U.S.C. § 1253(h) (1994) [presently codified at 8 U.S.C. § 1231(b)(3) (1998)], "conform[ ] to the language of Article 33" of the Convention, *INS v. Stevic*, 467 U.S. 407, 421 (1984), including each of the exceptions to that withholding obligation. *See* 8 U.S.C. § 1253(h)(2)(A)-(D) (1994). Indeed, the conferees included these exceptions in the Refugee Act based on their explicit "understanding that [they were] based directly upon the language of the Protocol"[3] and would be "construed consistent with the Protocol." H.R. Conf. Rep. No. 96-781, at 20 (1980), *reprinted in* 1980 U.S.C.C.A.N. 160, 161; *see McMullen v. INS*, 788 F.2d 591, 594 (9th Cir. 1986).[4] In view of this unambiguous expression of congressional intent, the Board of Immigration Appeals ("BIA" or "Board")—however broad its discretion might otherwise be—is obligated to construe the serious non-political crime exclusion in a manner consistent with the Protocol. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984).

As is the case with any treaty provision, construction of the serious non-political crime exclusion in the Convention must begin with the text. *See Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 65 (1993). "As treaties are contracts between independent nations, their words are to be taken in their ordinary meaning 'as understood in the public law of nations.'" *Santovincenzo v. Egan*, 284 U.S. 30, 40 (1931).

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3 The serious non-political crime exception tracks the language of the Protocol verbatim. *Compare* Immigration and Nationality Act ("INA"), 8 U.S.C. § 1253(h)(2)(C) (1994), *with* Convention, art. 1F(b).

4 This would be the case even in the absence of express congressional intent, since a statute "ought never be construed to violate the law of nations, if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *accord Weinberger v. Rossi*, 456 U.S. 25, 32 (1982).

While it is clear that a crime must be both "serious" and "non-political" to fall within the scope of Article 1F(b), nowhere does the Convention define the terms "serious crime" or "non-political crime." Nor do either of these terms, when read in isolation, have any accepted meaning in ordinary usage or uniform understanding in the law of nations. The term "serious" is context-dependent and, as Petitioner acknowledges (at 20-21), inherently ambiguous. The same can be said about the term "political crime," though this concept is familiar to the international community from the law of extradition. (*See infra* Point IV.)

As the intent of the parties cannot be determined from the text itself, it is necessary to turn to principles of treaty interpretation to ascertain Article 1F(b)'s meaning. The most basic such principle dictates that the phrase "serious non-political crime" be "read in the light of the conditions and circumstances existing at the time" the Convention was entered into and construed "with a view to effecting the objects and purposes of the States thereby contracting." *Rocca v. Thompson*, 223 U.S. 317, 331-32 (1912); *accord* Vienna Convention on the Law of Treaties, art. 31(1), 1155 U.N.T.S. 331 (1969) ("Vienna Convention"). Recognizing the importance of keeping faith with the purposes that animate international agreements, this Court has counseled that they "be construed in a broad and liberal spirit" and that "when two constructions are possible, one restrictive of rights that may be claimed under [them] and the other favorable to [those rights], the latter is to be preferred." *Asakura v. City of Seattle*, 265 U.S. 332, 342 (1924); *accord United States v. Stuart*, 489 U.S. 353, 368 (1989).

The core purpose of the Convention and Protocol was to safeguard the rights of vulnerable individuals who, by virtue of the grave consequences that might await them in their homelands, are in need and deserving of international protection. This purpose is reflected in the Preamble to the Convention in which the contracting parties profess their "profound concern for refugees" and endeavor to "assure refugees the widest possible exercise" of their "fundamental rights and freedoms." The Convention was adopted for the explicit purpose of extending "the scope of and the protection accorded by" previous international agreements relating

to the status of refugees. *Id.* at *pmbl.* The humanitarian goals of the Convention were mirrored in the Refugee Act in which Congress declared its purpose was to enforce the "historic policy of the United States to respond to the urgent needs of the persons subject to persecution in their homelands," Refugee Act § 101(a), and to provide "statutory meaning to our national commitment to human rights and humanitarian concerns." S. Rep. No. 256, at 1 (1979), *reprinted in* 1980 U.S.C.C.A.N. 141.

The exclusion clauses contained in Article 1F were intended to deny the protections of the Convention to certain categories of individuals "who were deemed unworthy" of international assistance. UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* ¶ 147 (1979, reedited 1992) ("*Handbook*").[5] The denial of those "fundamental protections of a treaty whose purpose is the protection of human rights is a drastic exception to the purposes of the Convention . . . and can only be justified where the protection of those rights is furthered by the exclusion." *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* [1998] 160 D.L.R.4th 193, 233-34 (Bastarache, J.) (Can.). In view of the humanitarian purposes underlying the Convention and "the serious consequences of exclusion for the person concerned . . . the interpretation of these exclusion clauses must be restrictive." *Handbook* ¶ 149.

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[5] The *Handbook* was prepared at the request of the Executive Committee of the High Commissioner's Programme, a body now comprised of representatives from 53 nations, including the United States, to provide guidance in applying the terms of the Convention. The criteria in the *Handbook* are based on UNHCR's experience, the practice of States in determining refugee status and the literature that has been devoted to the subject over a period of nearly 50 years. Acknowledging the expertise of the UNHCR in matters involving interpretation of the Convention and Protocol, this Court has stated that "the *Handbook* provides significant guidance in construing the Protocol, to which Congress sought to conform" and "in giving content to the obligations that the Protocol establishes." *Cardoza-Fonseca*, 480 U.S. at 439 n.22.

II. THE OBJECT AND PURPOSE OF ARTICLE 1F(b) IS TO DISTINGUISH *BONA FIDE* REFUGEES FROM SERIOUS COMMON CRIMINALS.

The vulnerable individuals whose fundamental rights the Convention was intended to protect are identified in Article 1A(2), which defines the term "refugee" as any person who is unwilling or unable to return to his country of origin "owing to well-founded fear of being persecuted for reasons of race, religion nationality, membership of a particular social group or political opinion." Consistent with the protective principles that underlie the Convention, the purpose of the exclusionary clauses was to draw a distinction between persons regarded as *bona fide* refugees deserving of international protection and persons who were deemed unworthy of such protection by virtue of their having committed one of the acts enumerated in those clauses. *See Pushpanathan*, 160 D.L.R.4th at 225 ("general purpose" of Article 1F is "to exclude . . . those who are not *bona fide* refugees").

Cognizant of the extreme consequences of exclusion, the Convention limited those clauses only to individuals who had committed acts of a heinous nature. Thus, Article 1F(a) applies to individuals who have committed "crimes against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes." The international instrument that was foremost in the minds of the drafters at the time the Convention was being debated was the Charter of the International Military Tribunal, 82 U.N.T.S. 279 (1945),[6] which defines crimes against peace as consisting principally of the "preparation, initiation or waging of war of aggression," and war crimes and crimes against humanity as including such barbarous acts as murder, extermination and enslavement of civilian populations and "wanton destruction of cities, towns or villages." *Id.* art. 6. Similarly, Article 1F(c) applies only to serious acts "of a criminal nature" that are

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[6] *See, e.g.*, Guy S. Goodwin-Gill, *The Refugee in International Law* 96 (2d ed. 1996); Atle Grahl-Madsen, 1 *The Status of Refugees in International Law* 276 (1966); Nehemiah Robinson, *Convention Relating to the Status of Refugees* 66-67 (1953).

"contrary to the purposes and principle of the United Nations," *Handbook* ¶ 162, and is directed principally, if not exclusively, to persons in positions of authority. *Id.* ¶ 163.[7]

Viewed in the context of the gravity of crimes covered under its sister provisions, it is apparent that Article 1F(b) was likewise intended to exclude from the definition of refugee persons who had committed acts so grave and unconscionable as to render them undeserving of international protection. *See Beecham v. United States*, 511 U.S. 368, 371 (1994).

That the serious non-political crime exception was intended to draw a distinction between refugees who are deserving of international protection and serious criminals who are not is apparent from the negotiating history of the Convention.[8] In the draft that was originally submitted to the Conference of Plenipotentiaries, the article which was to become Article 1F(b) denied the benefits of the Convention:

> to any person with respect to whom there are serious reasons for considering that (a) he has committed a crime specified in article VI of the London Charter of the International Military Tribunal; or (b) he falls under the provisions of article 14, paragraph 2, of the Universal Declaration of Human Rights.

Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, U.N. Doc. A/CONF.2/1 at 5 (Mar. 12, 1951).

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7 The negotiating history provides an indication of the gravity of the acts Article 1F(c) was meant to encompass. *See, e.g.*, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of Meetings, U.N. Doc. A/CONF.2/SR.24 at 5 (July 17, 1951) (remarks of Mr. Hoare of the United Kingdom) ("such acts as war crimes, genocide and the subversion or overthrow of democratic regimes"). *See also* Grahl-Madsen, *supra* note 6, at 286 (violations of basic human rights).

8 Recourse to "extrinsic material is often helpful in understanding the . . . *purposes*" of a treaty, "thus providing an enlightened framework for reviewing its terms." *Xerox Corp. v. United States*, 41 F.3d 647, 652 (Fed. Cir. 1994) (emphasis added). Moreover, this Court "look[s] beyond the written words to the history of the treaty" when the terms in the text make interpretation "difficult or ambiguous." *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 535 (1991); *accord Air France v. Saks*, 470 U.S. 392, 400 (1985); Vienna Convention, art. 32, 1155 U.N.T.S. 331.

Under Article 14(2) of the Universal Declaration of Human Rights, the right to seek and enjoy asylum from persecution could "not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations." U.N. Doc. A/RES/217(A)(III) (1948). As its language makes clear, Article 14(2) was principally directed at fugitives from justice whose primary reason for seeking refuge was to escape punishment for a crime, rather than to avoid persecution. Accordingly, in its original form, Article 1F(b) would only have barred those applicants whose "case" could be characterized as one of genuine "prosecution" for a non-political crime, as opposed to one of persecution on account of a Convention reason.

Consistent with the original language of Article 1F(b), the French representative to the negotiating conference repeatedly expressed his understanding that the purpose of the crime exclusion was to create a "means of sorting out" serious criminals on the one hand and "*bona fide* refugees" on the other.[9] Unwilling to allow the Convention to be exploited by fugitives from justice and hardened criminals who might be able to make out a claim of persecution, the French representative considered such a sorting out imperative in order to bring "the Convention into accordance with the requirements of international morality." Ad Hoc Committee on Statelessness and Related Problems, Summary Record of Meetings, U.N. Doc. E/AC.32/SR.33 at 8 (Sept. 20, 1950) (remarks of Mr. Rochefort).

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9 U.N. Doc. A/CONF.2/SR.24 at 10 (remarks of Mr. Rochefort). *See also id.* at 5. The French view was shared by others who noted that Article 14(2) "was clearly related to the issue of extradition," U.N. Doc. A/CONF.2/SR.29 at 16-17 (July 19, 1951) (remarks of Mr. Petrén of Sweden), and "was intended to apply to persons who were fugitives from prosecution in another country for non-political crimes," *id.* at 14 (remarks of Mr. Hoare). *See also* U.N. Doc. A/CONF.2/SR.24 at 6 (remarks of Mr. Trützschler of the Federal Republic of Germany); *Pushpanathan*, 160 D.L.R.4th at 233; Grahl-Madsen, *supra* note 6, at 291-92 (expressing view that purpose of Article 1F(b) was "to prevent the Convention from being exploited by persons who are fugitives from justice rather than genuine political refugees").

The views of the French delegation are important because it was at France's insistence that a proposed British amendment to eliminate the exclusion for common law crimes was rejected. U.N. Doc. A/CONF.2/SR.24 at 4-5 (July 17, 1951) (remarks of Mr. Hoare) (expressing view that it was "quite arbitrary and unjustifiable to place such persons beyond the scope of the Convention").[10] As a result of France's admonition that it would not be able to ratify the Convention if the British amendment were adopted, U.N. Doc. A/CONF.2/SR.24 at 13 (remarks of Mr. Rochefort), the British delegation accepted a French-backed compromise, U.N. Doc. A/CONF.2/SR.29 at 20 (July 19, 1951), under which the language referring to the Universal Declaration was replaced with the "serious crime" language that was ultimately incorporated into the final draft. While this compromise eliminated the requirement that a prosecution be pending in order to exclude an applicant suspected of criminal conduct, its principal purpose was to address the concerns of the United Kingdom and other States that persons who committed "minor offenses" not be excluded from the benefits accorded to refugees under the Convention.[11] In view of its roots in Article 14(2) of the Universal Declaration and the intention that it apply to a more serious category of criminal than that covered under Article 14(2), Article 1F(b) is properly construed as applying only where a State concludes that, by virtue of the seriousness of the alleged crime, the *case* of an applicant is, in reality, one of prosecution rather than persecution or that his criminal character predominates over his character as a *bona fide* refugee. *See Handbook* ¶ 156.

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10 The British amendment enjoyed significant support. *See, e.g.*, U.N. Doc. A/CONF.2/SR.29 at 12 (remarks of Baron van Boetzelaer of the Netherlands); *id.* at 14 (remarks of Mr. Herment of Belgium); *id.* at 17 (remarks of Mr. Petrén of Sweden).

11 *See, e.g.*, U.N. Doc. A/CONF.2/SR.24 at 8 (remarks of Mr. Hoare); U.N. Doc. A/CONF.2/SR.29 at 14 (remarks of remarks of Baron van Boetzelaer).

III. ARTICLE 1F(b) REQUIRES THAT CONSIDERATION BE GIVEN TO THE TOTALITY OF THE CIRCUMSTANCES IN ASCERTAINING WHETHER A CRIME IS SERIOUS.

UNHCR considers that the correct approach to ascertaining whether the offense of which an applicant is suspected constitutes a "serious non-political crime" within the meaning of Article 1F(b) is set forth in the *Handbook*. In order to make the distinction between serious common criminals and refugees that lies at the heart of Article 1F(b), it is essential that the totality of the circumstances surrounding the applicant's case be considered. At the outset, therefore, the crime for which the applicant has been or may be prosecuted and the sentence that has been or might be imposed must be identified. Next, "all the relevant factors—including any mitigating [or aggravating] circumstances must be taken into account." *Id.* ¶ 157. Finally, it is "necessary to strike a balance between the nature of the offense presumed . . . and the degree of persecution feared. If a person has a well-founded fear of very severe persecution, *e.g.* persecution endangering his life or freedom, a crime must be very grave in order to exclude him." *Id.* ¶ 156. As the Ninth Circuit ruled that this is the standard that should be applied in determining excludability under Article 1F(b) (Pet. at 6a-7a), its decision correctly construed U.S. obligations under the Protocol and should, therefore, be affirmed by this Court.[12]

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12 Congress, in the INA, has defined numerous crimes to be "aggravated felonies," 8 U.S.C. § 1101(a) (43) (1998), and, since 1990, has deemed all such felonies to be "particularly serious crimes" for purposes of § 1253(h)(2)(B), which bars applicants from withholding of deportation when they are convicted of such crimes in the United States. Immigration Act of 1990, Pub. L. No. 101-649, § 515(a), 104 Stat. 4978, 5053 (1990). It has been UNHCR's consistent position that this automatic bar to relief is inconsistent with a proper construction of the parallel exception contained in Article 33(2) of the Convention. *See Garcia v. INS*, 7 F.3d 1320, 1324 (7th Cir. 1993) (quoting position of UNHCR). Indeed, cognizant of this difficulty, Congress added a provision to the INA that gave the Attorney General discretion to grant an applicant relief if she deemed it "necessary to ensure compliance with the 1967 Protocol," notwithstanding the fact that such applicant may have been convicted of an "aggravated felony." Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No.

A. The Determination Of Seriousness Under Article 1F(b) Requires Consideration Of The Nature And Circumstances Of The Alleged Crime And The Character Of The Accused.

It is axiomatic that the determination of whether a crime is serious enough to raise the possibility of exclusion under Article 1F(b) must begin with an understanding of the nature of the crime at issue and the punishment that has been or may be imposed. Accordingly, an adjudicator must in the first instance identify the crime or crimes that the applicant is suspected of having committed under the law of the country in which the crime occurred. In a case in which an applicant has been convicted of a crime and criminal records are available, such an identification is no more than a ministerial function. Where, however, the only evidence of a crime being committed is the applicant's own testimony, identification of the crime, including all of the elements thereof, and the punishment that might be imposed, can be a much more difficult task.[13] It is, however, essential to any evaluation of whether the crime in question can be deemed a "serious non-political crime outside the country of refuge."[14]

104-132, § 413(f), 110 Stat. 1214, 1269 (1996). Pet Br. at 3a-4a. When Congress subsequently enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, § 307, 110 Stat. 3009-546, 612-14 (1996) several moths later, however, it repealed this provision. Pet. Br. at 5a-6a.

The fact that Congress has broadened § 1253(h)(2)(B)'s bar for crimes committed in the United States in a manner inconsistent with Article 33(2) does not, *ipso facto*, support an inference that Congress intended to broaden § 1253(h)(2)(C)'s bar for suspected criminal conduct abroad in a manner inconsistent with Article 1F(b). Indeed, the fact that Congress has not enacted a parallel amendment deeming aggravated felonies to be "serious crimes" for purposes of § 1253(h)(2)(C) supports the opposite inference, particularly in view of the Refugee Act's purpose of conforming its exclusionary provisions to the requirements of the Protocol.

13 *See, e.g., Matter of Ballester-Garcia*, 17 I.&N. Dec. 592, 594 (BIA 1980) (noting that it is the duty of "the immigration judge, and later [of] this Board, to decipher exactly what crime was involved in a given case").

14 Even where an applicant has been sentenced, the BIA has recognized the importance of identifying the crime for purposes of "shed[ing] light on an

The determination of seriousness also requires an evaluation of the circumstances surrounding the commission of that crime. Among the factors that should be considered in making such an evaluation are: (1) the intent and motive of the accused; (2) the degree of the accused's participation; (3) whether the crime was against persons or property;[15] (4) the seriousness of any injury caused in the case of crimes against persons; (5) the value of things taken or destroyed in the case of crimes against property; (6) the age of the accused; (7) the punishment that might have been imposed had a comparable crime been committed in the country of refuge; and, (8) any other aggravating or mitigating circumstances that might be relevant in ascertaining an appropriate punishment. *See, e.g., Matter of Ballester-Garcia*, 17 I.&N. Dec. 592, 595 (BIA 1980); Guy S. Goodwin-Gill, *The Refugee in International Law* 107 (2d ed. 1996); *Handbook* ¶ 157.

The nature of certain crimes such as murder, rape, child molestation and armed robbery is such as to raise a presumption of seriousness prior to any weighing of these factors. A much more careful examination of them is required, however, in the case of crimes such as assault, narcotics offenses, theft and malicious destruction of property where the range of penalties may vary greatly depending on the circumstances of the case. As set forth in the BIA's decision in *Ballester-Garcia*, at the time the Refugee Act was enacted, U.S. practice was consistent with this approach:

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alien's crime, or on how the . . . government views given crimes, i.e., whether the regime in general treats the same crimes in the same way vis-à-vis sentencing, and whether the sentences meted out reflect the government's views on the seriousness of the crimes." *Ballester-Garcia*, 17 I.&N. Dec. at 595. While such information is useful in all cases, it is of vital importance where, as here, no punishment has been imposed and, hence, no yardstick exists with which to measure how seriously the crime would be viewed by the government whose laws may have been violated. The Board's decision, however, does not identify the crime or crimes that may have been committed or what sentences may have been imposed under Guatemalan law.

15 *See Matter of Frentescu*, 18 I.&N. Dec. 244, 247 (BIA 1982) (noting that crimes against persons are more likely to be categorized as serious than crimes against property).

> Where a crime such as murder or armed robbery is at issue, we are unlikely to have much trouble in making this determination [of seriousness]. Where the crime is not obviously heinous, perhaps involving an offense against property only, determining the seriousness of the crime becomes a difficult task. In these situations, such factors as the alien's description of the crime, the turpitudinous nature of the crime according to our precedents, the value of the property involved, the length of sentence imposed and served, and the usual punishments imposed for comparable offenses in the United States, are all proper considerations in attempting to decide whether or not a crime may have been serious.

17 I.&N. Dec. at 595. *See also Matter of Frentescu*, 18 I.&N. Dec. 244, 247 (BIA 1982) (ruling that similar factors must be analyzed "in most proceedings" involving a "particularly serious crime" determination under § 1253(h)(2)(B)).[16]

In evaluating these factors, the overriding objective should be to determine whether the crime is so serious as to justify the possibility of *refoulement* of an alleged perpetrator to a country in which he has a well-founded fear of persecution. In view of the humanitarian purposes of the Convention and the extreme

16 Under a joint UNHCR/State Department status determination exercise involving Cuban applicants who had arrived in the United States during the Mariel exodus in 1980, crimes against property (such as burglary) and assault were only regarded as "serious crimes" when aggravating circumstances such as use of dangerous weapons, injury to persons, and property of significant value were involved. *See* Goodwin-Gill, *supra* note 6, at 107. Similarly, the BIA has found applicants to be excludable for such crimes only when significant aggravating circumstances have been present. *Compare Matter of Juarez*, 19 I.&N. Dec. 664, 665 (BIA 1988) ("[e]xcept possibly under unusual circumstances . . . we would not find a single conviction for a misdemeanor offense [of assault with a deadly weapon] to be a 'particularly serious crime'"), *with Matter of B*, 20 I.&N. Dec. 427, 430 (BIA 1991) (holding aggravated battery to be "particularly serious crime" because it involved use of firearm, victim was hit with bullet, and applicant was sentenced to five years imprisonment). The Board's decision in this case does not indicate that it considered such factors as Respondent's motive, the degree of his participation in the alleged crimes, the value of property he was suspected of destroying, the extent of any personal injury he may have caused, and the punishment that may have been imposed upon him for comparable offenses if committed in the United States.

consequences of exclusion, a crime cannot bar an applicant from being recognized as a refugee unless it can be classified as "a capital crime or a very grave punishable act. Minor offenses punishable by moderate sentences are not grounds for exclusion under Article 1F(b)." *Handbook* ¶ 155; *see also Gil v. Canada (Minister of Employment and Immigration)* [1994] 119 D.L.R.4th 497, 517 (Fed. Ct.) (noting that for a crime to be serious under Article 1F(b) it must "carry with it a heavy penalty which at a minimum will entail a lengthy term of imprisonment and may well include death").

In order to make the distinction between serious common criminals and refugees required by Article 1F(b), it is essential to look not only at factors that are directly related to the crime, but also to circumstances that define the character of the individual suspected of its commission. Thus, the *Handbook* provides that "[t]he fact that an applicant convicted of a serious non-political crime has already served his sentence or has been granted a pardon or has benefited from an amnesty" constitutes relevant mitigating circumstances that should be considered in ascertaining the applicability of the serious non-political crime exclusion. *Id.* ¶ 157.[17]

Even when an applicant's debt to society has been paid or forgiven and it can be established, therefore, that he is fleeing persecution rather than prosecution, his criminal character may nonetheless be shown to predominate over his character as a refugee. *See Handbook* ¶ 157. Thus, the *Handbook* states that "[i]t is also necessary to have regard to any aggravating circumstances" such as the "criminal record" of the applicant and evidence showing lack of rehabilitation or remorse. *Id.*

Notwithstanding Petitioner's present position, the United States has, in fact, looked beyond the nature of the crime in connection with excludability determinations under Article 1F(b).

17 Several leading commentators have argued that Article 1F(b) should rarely, if ever, be applied where an applicant has served his sentence or been pardoned. *See, e.g.*, Grahl-Madsen, *supra* note 6, at 291-92; James C. Hathaway, *The Law of Refugee Status* 222 (1991); Paul Weis, *The Concept of Refugee in International Law*, 87 J. du Droit International 928, 984-86 (1960).

For instance, in resolving the cases of suspected criminals who arrived from Cuba during the Mariel exodus in 1980, the State Department considered contextual factors—such as evidence of habitual criminal conduct and whether five years or more had elapsed since completion of sentence—in determining excludability. *See* Goodwin-Gill, *supra* note 6, at 107. Similarly, in *Ballester-Garcia*, 17 I.&N. Dec. at 595, the Board stated that "the length of sentence imposed *and served*" is an appropriate consideration in evaluating whether a crime is serious under § 1253(h)(2)(C).[18]

B. The Determination Of Seriousness Under Article 1F(b) Requires Consideration Of The Likelihood And Severity Of The Persecution Feared.

The determination whether a person is a fugitive or serious criminal on the one hand or a *bona fide* refugee on the other necessarily entails giving careful consideration to the reasons that have led that person to seek refuge. Thus, in applying Article 1F(b), it is essential that "the gravity of the persecution of which the offender may have been in fear, and the extent to which such fear is well-founded be duly considered." *Handbook* ¶ 161. An applicant is excludable only when a determination has been made based on a balancing of these factors that the crime of which he is suspected is so serious as to support the conclusion either that he is "in reality a fugitive from justice" or that "his criminal character" outweighs his "character as a *bona fide* refugee." *Id.* ¶ 156.

Rather than allowing any room for consideration of the totality of circumstances surrounding an applicant's claim, including the reasons why he is seeking refuge, the Board employed an approach to Article 1F(b) that would limit the inquiry to a sterile examination of the nature of the crime alone and require the determination of seriousness to be made in a vacuum. Because, as Petitioner correctly observes (at 28-29), Article 1F creates an

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[18] Since most countries take into account both aggravating and mitigating factors, such as past criminal behavior in making sentencing decisions, consideration of the amount of the sentence imposed necessarily involves factors that are unrelated to the crime for which an applicant has been convicted.

absolute bar on persons who are determined to be excludable, the consequences of such a construction would be to deny individual States the right to recognize the status of persons they believe to be refugees deserving of international protection, rather than serious criminals or fugitives from justice. Such a result is inconsistent with the overriding humanitarian purposes of the Convention and the intent of the drafters.[19]

1. Construction of Article 1F(b) in a manner that precludes consideration of the totality of circumstances could yield grossly inhumane results.

A construction of Article 1F(b) in which the excludability determination turns upon whether a crime meets some abstract minimum threshold of seriousness without regard to context could lead to grossly inhumane results. Such a construction would require any State that has ratified the Convention to deny refugee status in any case in which there were serious reasons to consider that a person had committed a crime that reached this threshold, regardless of the likelihood and severity of the persecution feared, of how many years past the act had been committed, and of whether the suspect had served his sentence or been pardoned. The consequences of precluding consideration of such factors could be severe. For instance, applying Petitioner's interpretation of Article 1F(b), the following individuals could be barred from

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[19] The Board's decision is consistent with its *dicta* in *Matter of Rodriquez-Coto*, 19 I.&N. Dec. 208, 209-10 (BIA 1985), wherein it first rejected the *Handbook's* approach to Article 1F(b). *Rodriquez-Coto* does not reflect any effort to ascertain the meaning of that article by applying basic principles of treaty interpretation, despite the fact that Congress clearly intended that it do so. *See supra* Point I. Given the BIA's failure to "consider[ ] the proper factors" and the fact that they are "peculiarly within [the BIA's] expert knowledge" and "would be useful in determining the correct interpretation" of the Convention and Protocol, a remand in this case may be proper in order that these instruments can be interpreted by the BIA in the first instance using the approach mandated by Congress. *American Postal Workers Union, AFL-CIO v. U.S. Postal Service*, 707 F.2d 548, 561 (D.C. Cir. 1983); *see also Abbot Labs. v. Young*, 920 F.2d 984, 990 (D.C. Cir. 1990) (holding that appellate court has "no authority to place a construction" on an ambiguous statute that "the agency has not offered," and remanding to agency for that purpose).

receiving international protection and placed back in the hands of their persecutors because of crimes considered to be "particularly serious" under U.S. law:

- a school teacher who, after having been forced into slave labor and brutally tortured by the Khmer Rhouge, fled Kampuchea in a stolen boat, a crime for which he was sentenced, *in absentia*, to a prison term of five years (8 U.S.C. § 1101(a)(43)(G)(1998));
- a Tutsi who had sought refuge at the time that genocide was being perpetrated against the Tutsi population in Rwanda, but who had been arrested on charges of tax evasion, (8 U.S.C. § 1101(a)(43)(M)(ii)), regardless of the fact that the alleged crime had been committed ten years before, he had been amnestied and he had no other criminal record;
- a Jew who applied for asylum in 1943 after escaping certain death in Auschwitz, but who thirty years earlier at the age of 18 had been convicted of an act of vandalism, (8 U.S.C. § 1101(a)(43)(F)), despite the fact that he had served his sentence and has been completely rehabilitated since his release.

Having adopted the Convention in the aftermath of, and largely as a response to, the extermination of European Jewry by Hitler's Germany, it is simply inconceivable that the drafters intended the serious non-political crime exclusion to be applied in such a harsh and mechanical manner. To the contrary, during the debate on the Convention, delegate after delegate expressed the view that even in exceptional circumstances it would be intolerable to return an "intractable refugee" to his country of origin in a situation where "certain death" awaited him.[20] In order to avoid

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[20] Ad Hoc Committee on Statelessness and Related Problems, U.N. Doc. E/AC.32/SR.20 at 15 (Feb. 1, 1950) (remarks of the Chairman). *See, e.g.*, U.N. Doc. E/AC.32/SR.40 at 31 (Aug. 22, 1950) (remarks of Mr. Henkin of the United States) (noting that "it would be highly undesirable to suggest . . . that there might be cases, even highly exceptional cases, where a man might be sent to death or persecution"); *id.* at 32 (remarks of Mr. Robinson of Israel) ("Governments . . . were not to send [intractable refugees] back to the country

such a result, it was understood that Article 1F(b) would involve a balancing between the nature of the crime committed and the degree of persecution feared. The remarks of the President concerning the approach to be followed in applying that article were summarized as follows:

> When a person with a criminal record sought asylum as a refugee, it was for the country of refuge to strike a balance between the offenses committed by that person and the extent to which his fear of persecution was well founded. He would simply ask representatives to keep in mind the hypothetical case of some minor official of an outlawed political party who had a criminal record. He was convinced that all countries, both in Europe and overseas, had, even under the earlier Conventions, always dealt with such cases fairly.[21]

Similarly, the British delegate stated that a person who was convicted of a crime in the country of refuge would be subject to *refoulement* "if the persecution to which he would be subjected in his country of origin was not very serious," but that "the power to expel him would not of course be employed if it would endanger his life." U.N. Doc. E/AC.32/SR.40 at 31 (Aug. 22, 1950) (remarks of Mr. Brass).

Based on their own exhaustive studies and for many of the reasons set forth herein, the most highly qualified publicists on the subject are virtually unanimous in their support for the position that an individual may not be excluded under Article 1F(b) where the risk and gravity of the persecution feared outweighs the significance of his criminal conduct.[22]

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where death awaited him."); *id.* at 31 (remarks of Mr. Brass of the United Kingdom).

[21] U.N. Doc. A/CONF.2/SR.29 at 23; *see* U.N. Doc. A/CONF.2/SR.24 at 13 (remarks of the President, speaking as representative of Denmark).

[22] *See, e.g.*, Goodwin-Gill, *supra* note 6, at 106-07; Grahl-Madsen, *supra* note 6, at 298; Hathaway, *supra* note 17, at 224-25; Weis, *supra* note 17, at 986.

2. Consideration of the totality of the circumstances is consistent with UNHCR and State practice.

Since the Convention entered into force in 1954, UNHCR has been called upon to conduct countless thousands of status determination interviews in order to ascertain whether an individual is entitled to international protection as a refugee in countries that are not parties to the Convention or Protocol. In countries that are parties to those instruments, UNHCR has provided guidance and recommendations aimed at ensuring that their provisions are interpreted and applied in a uniform manner and a humanitarian spirit. In fulfilling both its adjudicative and its advisory role, UNHCR has consistently followed the criteria set forth in the *Handbook*, including with respect to the Article 1F(b) requirement that a balance be struck "between the nature of the offence . . . and the degree of persecution feared." *Id.* ¶ 156.

The provisions of the *Handbook*, including the balancing requirement, were based upon State practice, exchanges of views with the competent authorities of contracting States and UNHCR's own extensive experience during a period of about 25 years preceding the *Handbook's* initial publication in 1979. *Id.* at 1. UNHCR respectfully submits that the comprehensive and fundamentally humanitarian approach set forth in the *Handbook* for evaluating whether criminal conduct is excludable under Article 1F(b) broadly reflects the common understanding of States regarding the application of that provision over a span of more than four decades after the effective date of the Convention. That understanding was recently affirmed by the 15 member States of the European Union who have issued an official statement setting forth their opinion that in applying Article 1F(b), "[t]he severity of the expected persecution is to be weighed against the nature of the criminal offense." Council of the European Union's Joint Position on the Harmonized Application of the Definition of the Term 'Refugee,' E.U. Doc. No. 96/196/JHA ¶ 13 (1996).[23]

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[23] Article 31 of the Vienna Convention provides that in construing a treaty "there shall be taken into account . . . (b) any subsequent practice in the application of the treaty." 1155 U.N.T.S. 331. Similarly, this Court has ruled that the practice of signatories to a treaty "cannot be ignored" when construing its meaning. *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 260 (1984); *accord Stuart*, 489 U.S. at 369. It is true that in the past several years, a small number of national tribunals that have considered the issue have reached conflicting decisions with respect to the proper interpretation and application of Article 1F(b). *Compare Pham*, SR 196.615 (Apr. 16, 1993) (decision of French Commission des Recours des Refugies (C.R.R.) adopting balancing test) *with T v. Secretary of State for the Home Dep't*, 2 All E.R. 865, 882 (H.L. 1996) (Lord Mustill (rejecting balancing test) and *Malouf v. Canada (Minister of Citizenship and Immigration)* [1995] 190 N.R. 230 (Fed. Ct. App.) (same). *Cf. Chahal v. United Kingdom*, 23 E.H.R.R. 413 (Eur. Ct. H.R. 1996) (exception in Article 33(2) to the principle of *non-refoulement* based on danger to national security requires balancing that danger against the degree of persecution feared). The decisions rejecting the approach set forth in the *Handbook* should, however, be evaluated in the light of the "reasonably harmonious practice" employed throughout the world during "the first 40 years of the Convention's existence." *Trans World Airlines*, 466 U.S. at 259.

Notwithstanding Petitioner's present position that it is impermissible to look beyond the nature of the crime itself in making the determination of seriousness, past U.S. practice has been consistent with the balancing approach. Prior to the enactment of § 421 of AEDPA in April 1996, which made individuals who had committed serious non-political crimes ineligible for asylum (Pet. at 8a), immigration judges were required under the Refugee Act to consider the totality of the circumstances, including the likelihood and severity of threatened persecution, in making the determination whether an applicant is entitled to asylum. Indeed, in *Matter of Gonzalez*, 19 I.&N. Dec. 682, 685 (BIA 1988), the BIA ruled that:

> The nature and gravity of [a] conviction [barring relief under section 243(h)] may militate heavily against an applicant for asylum, and in some cases may ultimately be the determinative factor, but it is not the only evidence that should be received and considered by an immigration judge or this Board in evaluating whether an otherwise eligible applicant warrants a grant to asylum as a matter of discretion.[24]

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[24] *See also Joseph v. INS*, 909 F.2d 605, 608 (9th Cir. 1990); *Arauz v. Rivkind*, 845 F.2d 271, 276 (11th Cir. 1988); *Shahandeh-Pey v. INS*, 831 F.2d 1384, 1387 (7th Cir. 1987) (holding that "it is imperative that all aspects" of an asylum application "be fully considered and that the Board's decision reflect this deliberation"); *Hernandez-Ortiz v. INS*, 777 F.2d 509, 518 (9th Cir. 1985)

Consistent with the BIA's decision in *Gonzalez*, the INS' internal operating manual instructed asylum officers that:

> Under the regulations, serious non-political crimes are not an absolute bar to a grant of asylum. See 8 C.F.R. § 208.14(d). Rather, an alien's complicity in a serious non-political crime committed abroad is a factor for the asylum officer to consider in the exercise of discretion.

INS, *Basic Law Manual* 68 (1991 & Supp. 1995) (*"Basic Law Manual"*). Among the discretionary factors that must be considered in deciding whether an applicant is entitled to asylum, the likelihood and severity of the persecution feared has been properly regarded as "the most compelling equity." *Shahandeh-Pey*, 831 F.2d at 1387; *accord Hernandez-Ortiz v. INS*, 777 F.2d at 518.[25]

In the case of an applicant suspected of having committed a serious non-political crime, the INS recognized that such balancing of all relevant factors was *required* under the Convention. As it noted in commenting on its proposed rule setting forth the guidance to be followed by immigration judges in resolving claims under the Refugee Act:

> In the asylum context, evidence of the commission of such non-political crimes will now be a discretionary factor to be considered together with the totality of circumstances and equities on a case-by-case basis *consistent with the proper intent of* the Refugee Act of 1980 as well as *the 1951 U.N. Convention and 1967 Protocol Relating to the Status of Refugees*.

(holding that the Board "must specify clearly the factors it has considered" when denying an asylum application).

25 Section 421(b) of the AEDPA applies only to "asylum determinations made on or after" its effective date. Pet. at 8a. Yet, despite the fact that the agency's determination in this case occurred on March 5, 1996—50 days *prior* to the effective date of § 421(b)—that decision does not reflect consideration of such favorable discretionary factors and instead declines "to address the respondent's statutory eligibility for asylum" in view of "the nature of his acts." Pet. at 17a-18a.

53 Fed. Reg. 11300, 11301 (Apr. 6, 1988) (emphasis added). The import-of Petitioner's present position is that, rather than being consistent with the Convention and Protocol, the former U.S. practice of considering the totality of circumstances, including the degree of persecution feared, violated those instruments whenever such consideration resulted in the granting of refugee status to a person who committed a non-political crime that is now deemed to be "serious" under U.S. law.[26]

Finally, it is worth noting that the balancing approach that is set forth in the *Handbook* in connection with determining excludability under Article 1F(b) is also part and parcel of the widely accepted distinction between persecution and prosecution with respect to determinations of refugee status under Article 1A. As the *Handbook* explains, "a person guilty of a common law offense may be liable to excessive punishment, which may amount to persecution." *Id.* ¶ 57; *see also id.* ¶ 85. Consistent with the *Handbook*, the BIA has acknowledged that "[e]vidence that punishment for a politically related act would be disproportionate to the crime would indicate persecution on grounds of political opinion rather than prosecution." *In re S.P.*, Int. Dec. 3287 (BIA 1996); *accord Chanco v. INS*, 82 F.3d 298, 302 (9th Cir. 1996). Under Petitioner's present view, however, the distinction between persecution and prosecution would be inapplicable whenever there were serious reasons to consider that an applicant had committed a crime that might be viewed as "serious" in the abstract. Thus, a dissident from a totalitarian State who had received a sentence of death for having bribed a local official (8 U.S.C. § 1101(a)(43)(R) (1998)), might be barred from receiving international protection under Article 1F(b), despite the fact that such penalty was imposed with a persecutory intent and was grossly disproportionate to the

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26 As set forth in Point III.A. *supra*, even outside of the context of asylum, U.S. practice has been to consider factors such as an applicant's criminal record and whether he has served his sentence in determining excludability under Article 1F(b). Inasmuch as such factors bear no more relation to the nature of a crime than does the degree of persecution feared, there is no principled basis for a construction of Article 1F(b) that would permit consideration of those factors, but preclude consideration of the latter.

three-year sentence normally imposed for such crimes under that State's law.

IV. ARTICLE 1F(b) IS APPLICABLE WHEN AN OFFENSE IS NOT CLOSELY RELATED TO A POLITICAL OBJECTIVE, IS DISPROPORTIONATE TO THAT OBJECTIVE OR IS ATROCIOUS IN NATURE.

The Convention offers no explicit guidance for determining what is meant by the term "non-political crime." The concept of a "political offense" is, however, a familiar one in extradition law[27] and it is clear that "the framers of the Convention had extradition law in mind" in choosing the term "non-political" in Article 1F(b) "and intended to make use of the same concept." *T v. Secretary of State for the Home Dep't*, 2 All E.R. 865 (H.L. 1996); *see also supra* note 9 and accompanying text.

Construing the "non-political crime" language in a manner that takes into account State practice in the area of extradition and the humanitarian purposes underlying the Convention, the *Handbook* sets forth the following approach for "determining whether an offence is 'non-political' or is . . . a 'political' crime" within the meaning of Article 1F(b):

> [R]egard should be given in the first place to [the] nature and purpose [of the offense] i.e. whether it has been committed out of genuine political motives and not merely for personal reasons or gain. There should also be a close and direct causal link between the crime committed and its alleged political purpose and object. The political element of the offence should also outweigh its common-law character. This would not be the case if the acts committed are grossly out of proportion to the alleged objective.

Id. ¶ 152. The INS has adopted essentially the same test as that set forth in the *Handbook* for determining whether a crime is political under § 1253(h)(3)(C) of the Refugee Act. As set forth in its *Basic Law Manual*, in order to qualify as "political," a crime must be

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27 *See United States v. Kin-Hong*, 110 F.3d 103, 113 (1st Cir. 1997) ("the political offense exception is now a standard clause in almost all extradition treaties").

committed out of "'genuine political motives'" and must have a "'direct, causal link'" with its "'alleged political purposes and object.'" *Id.* at 68 (quoting *McMullen v. INS*, 788 F.2d 591, 595 (9th Cir. 1986)) In addition:

> [e]ven if the preceding standards are met, a crime should not be considered a serious non-political crime if the act is disproportionate to the objective, or if it is of an atrocious and barbarous nature.

Basic Law Manual at 68 (citing *McMullen*, 788 F.2d at 595).

UNHCR's clear position is that acts can never qualify as "political" within the meaning of Article 1F(b) when they are atrocious in nature. In every conceivable instance, the use of indiscriminate killing, summary execution, torture and other such atrocities to achieve political ends will surpass the absolute outer limits of reasonable proportionality. Thus, UNHCR would not under any circumstances regard a person who has committed acts of such a barbarous nature as deserving of international protection, regardless of his political objectives.

Within the broader spectrum of politically motivated acts that are not atrocious in nature, Article 1F(b) requires a careful analysis of whether those acts are closely linked with and reasonably proportionate to their political objectives. As set forth below, the determination of whether an act involving use of force can be regarded as a "political crime" can involve difficult questions the resolution of which requires consideration of the context and all of the circumstances surrounding such use.

A. The Convention Requires Consideration Of The Relationship Between The Offense And Its Objective In Determining Whether It Is Political Within The Meaning Of Article 1F(b).

In order to be classified as political under Article 1F(b), a crime must be causally related to the achievement of a genuine political objective that is consistent with the principle of respect for human rights and fundamental freedoms. *Handbook* ¶ 152. In determining whether such a relationship exists, the focus must be on "the circumstances surrounding the acts" at issue. *McMullen*, 788 F.2d at 597.

Of particular significance in evaluating the relationship between the offense and its purpose is the status of the person or property against which the act is principally directed. At one end of the spectrum, the political link is strongest for offenses primarily directed against government personnel and property. At the other end of the spectrum, the link is weakest when politically motivated acts are principally directed against private interests and is non-existent when those acts are intended to do nothing more than "promote social chaos." *McMullen*, 788 F.2d at 597. As the Ninth Circuit noted in *McMullen*, this distinction between "acts directed at the military or official agencies of the state, and random acts of violence against ordinary citizens . . . has been extant in the common law" since the British case of *In re Meunier*, 2 Q.B. 415 (1894). *Id.*; *see also Ornelas v. Ruiz*, 161 U.S. 502, 509-12 (1896); *Eain v. Wilkes*, 641 F.2d 504, 521 (7th Cir. 1981).

The fact that an offense is aimed at a government target is a factor that should weigh heavily in favor of a finding of a causal relationship between a politically-motivated crime and its objective—though that factor would not necessarily be sufficient to establish such a relationship. On the other hand, while the fact that civilians were harmed would weigh against finding such a link, it would be wrong to conclude that a crime can never be deemed political when it has an impact upon private persons or property.[28] It is clear, however, that when civilians are injured or killed as a result of barbarous acts, such as indiscriminate bombing and other acts of terrorism, the linkage between those acts and the political motivation of the perpetrator can never be sufficient. *McMullen*, 788 F.2d at 597; *accord Eain*, 641 F.2d at 521.

A distinction should be drawn between acts that are primarily directed against civilians, such as indiscriminate acts of violence

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[28] *See, e.g., In re Ezeta*, 62 Fed. 972, 1003 (N.D. Cal. 1894) (finding that military officer's seizure of funds from privately owned bank in order to pay armed forces who were seeking to defend government from armed rebellion was a political crime); *Regina v. Governor of Brixton Prison ex parte Kolczynski*, 1 Q.B. 540, 549 (1955) (finding that actions of Polish seamen who seized a fishing trawler and assaulted its master in order to escape political prosecution constituted a political crime).

that are intended to inflict pain and suffering upon them, and acts that are primarily directed against the government, but that have an incidental or accidental affect on civilians. In the latter case, an offense may be regarded as political—so long as it is not otherwise out of proportion to its political objective. *See Gil*, 119 D.L.R.4th at 516. Thus, for instance, the fact that a civilian may have been accidentally injured during the course of an armed rebellion would not disqualify the associated act from being considered a "political crime." *Id.* Similarly, the fact that a participant in a political uprising may have used physical force to get past a group of civilians who were blocking the path between him and government troops would not disqualify him from being regarded as a political offender, unless again the amount of force used was excessive or otherwise disproportionate to his political objectives.[29]

Even in cases in which the affect on private interests is not accidental or incidental, a crime might still be regarded as political if those private interests are directly and closely related in some significant way to a political objective. For instance, the act of American colonialists in dumping tea privately owned by the East India Company into Boston harbor shortly before the outbreak of the American Revolution might be regarded as "political" because of the close relationship to the government-imposed tax they were protesting and the property destroyed.

B. A Crime Is Non-Political Within The Meaning Of Article 1F(b) If It Is Disproportionate To Its Political Objectives.

Even if a crime is closely linked to a political objective, it may not be deemed "political" within the meaning of Article 1F(b) unless its political elements "outweigh its common-law character."

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[29] The Board's decision does not reflect whether it considered if the alleged injuries resulted from acts primarily directed against the government or against private persons or property. The Board also did not state whether it regarded the bus owners to be among the victims of the alleged crimes (*see* Pet. at 18a) or whether it regarded the buses as being publicly or privately owned. Given the emphasis the Board placed on the status of the victims in making its proportionality finding, it is, therefore, not clear whether the Board viewed the destruction of those buses to be a "non-political crime."

Handbook ¶ 152; *accord Matter of McMullen*, 19 I.&N. Dec. 90, 97-98 (BIA 1984). As the BIA has ruled, the political elements of an offense cannot predominate over its criminal character when that offense is "grossly out of proportion to the political objective" or is of "an atrocious nature." *McMullen*, 19 I.&N. Dec. 90, 98; *accord Handbook* ¶ 152.

Where atrocities akin to murder, torture, or maiming of innocent civilians are not involved, balancing the criminal character of an act against its political elements is required. Such balancing involves consideration of the totality of relevant circumstances, including at the outset, the nature of the offense, the amount of the damage and the status of the person or property affected. *See, e.g.*, *Handbook* ¶ 86; *McMullen*, 788 F.2d at 595-97. All relevant factors must then be evaluated in light of the extent to which lawful or less violent means of protest are available for achieving the political objective in question.[30] In determining whether the means used in furtherance of a political objective are proportionate, account must also be taken of the consistency of those means with the international instruments governing human rights and, where relevant, the laws of armed conflict.

Such a balancing is unavoidable since resort to force in pursuing a political objective does not *per se* render an individual excludable under Article 1F(b). While the use of force is to be taken into account, it must be borne in mind that political offenses may take place in the context of an armed conflict or insurrection[31] and that "[a]pplications for refugee status" are, therefore, "frequently made by persons who have used force" that is associated with their "political activities or political opinions." *Handbook* ¶ 175. As the *Handbook* makes clear (¶ 176), the applications of such individuals must "be examined from the standpoint of the inclusion clauses in the 1951 Convention," as

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30 *See, e.g.*, *Chanco*, 82 F.3d at 401; *Dwomoh v. Sava*, 696 F. Supp. 970, 978 (S.D.N.Y. 1988); *Matter of Izatula*, 20 I.&N. Dec. 149, 154 (BIA 1990); *Governor of Brixton Prison*, 1 Q.B. at 549.

31 Indeed, "historically," the political offense exception "embraced only offenses aimed either at accomplishing political violence or at repressing violent political opposition." *Koskotas v. Roche*, 931 F.2d 169, 172 (1st Cir. 1991).

well as from the standpoint of the exclusion clauses, to determine whether, in light of all of the circumstances, they have a "fear of persecution and not merely a fear of prosecution" and, hence, are deserving of international protection. *Id.* ¶ 86; *see* cases cited *supra* note 30. Accordingly, a finding that an offense involves the use of force is not by itself sufficient to support a conclusion that its political nature is outweighed by its criminal character.

Nor, as explained in Point IV.A, *supra*, would a finding that civilians were adversely affected by the offense, without more, be sufficient to support such a conclusion—though it would make a finding of proportionality less likely. On the other hand, if an offense constitutes a grave violation of human rights or of the law of armed conflict,[32] such an act could not be characterized as "political," regardless of the objectives being pursued or whether the victim of that offense was a civilian, a government official or a member of the military.[33] Thus, for instance, if rather than using the minimum amount of force necessary to clear civilians from a presidential palace that had been seized during a rebellion, armed insurgents were to shoot them in cold blood, such act would not be considered a political crime. Nor could the torture of a government soldier be regarded as a political offense even if carried out in order to obtain information vital to the rebellion. As the district court explained in *Matter of Doherty*, 599 F. Supp. 270, 274 (S.D.N.Y. 1984) "a proper construction" of the political offense exception:

> requires that no act be regarded as political where the nature of the act is such as to be violative of international law, and

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32 Of course, where there are "serious reasons for considering" that an applicant for refugee status has committed a "war crime," the individual must be excluded from the Convention's protections under Article 1F(a), without considering whether the offense was "non-political."

33 *See, e.g.*, *Matter of Marzook*, 924 F. Supp. 565, 577-78 (S.D.N.Y. 1996); *Matter of Ahmad*, 726 F. Supp. 389, 408 (E.D.N.Y. 1989) ("[o]ffenses that transcend the Law of Armed Conflict are beyond the limited scope of the political offenses"); *Matter of Doherty*, 599 F. Supp. 270, 274 (S.D.N.Y. 1984), *appeal dismissed*, 615 F. Supp. 755 (S.D.N.Y. 1985), *aff'd*, 786 F.2d 491 (2d Cir. 1986).

inconsistent with the international standards of civilized conduct. Surely an act which would be properly punishable even in the context of a declared war or in the heat of open military conflict cannot and should not receive recognition under the political [crime] exception.

Uses of force that are neither atrocious nor violative of international standards of conduct may, depending upon the circumstances, be deemed proportionate to political objectives. In view of the extreme consequences of exclusion for the person concerned and the humanitarian principles that underlie the Convention, a comprehensive approach to the issue of proportionality that takes into account all of the circumstances surrounding the offense and its objectives is necessary to ensure that *bona fide* refugees receive the international protection they deserve.[34]

CONCLUSION

For the foregoing reasons, UNHCR, as *amicus curiae*, respectfully urges that the decision of the Ninth Circuit be affirmed.

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[34] The Board's decision does not reflect whether, in making its proportionality determination, it considered such factors as: (1) the amount of damage caused, (2) the extent to which alternative means of protest were available for achieving those objectives, and (3) the extent to which those means were consistent or inconsistent with international standards of civilized conduct. The Board's decision does suggest that it viewed the fact that Respondent's acts "attract[ed] the attention" of the government as significant. Pet. at 18a. The relevance of that factor to the determination of whether an offense meets the proportionality test is unclear. Given that political offenses, by definition, have as their objective the alteration of the policies or structure of government, those offenses will almost invariably attract government attention.

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